FOR ARGUMENT

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 75-355

BANGOR PUNTA CORPORATION, NICOLAS M. SALGO, AND DAVID W. WALLACE,
Petitioners,
v.
CHRIS-CRAFT INDUSTRIES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS WITH ADDENDUM IN RESPONSE TO THE BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION

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PREFACE: THE SEC BRIEF

The SEC's 195-page amicus Brief was filed on Friday, September 3, 1976, more than a month out of time.* It

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* *See* Rule 42(2) of this Court. Respondent's Brief was due and filed on August 2.

is not signed by the Solicitor General or anyone in his office, and it departs in significant respects from the views of the United States in its Brief on Certiorari, which counsel for the SEC also signed. (*See* SEC Brief at 197-98).

The Clerk has advised us that the briefs in chief have been distributed and that the case has been set for argument on October 6. Under these circumstances, in order to provide a response in time to be useful to the Court, we have included in this Brief in reply to CCI a short Addendum answering the remarkably few relevant points in the SEC Brief. *See* p. 54, *infra*.

REPLY TO CCI'S STATEMENT OF THE CASE

Petitioners agree with CCI (CCI Brief at 5) that the facts of this case have been established and only legal issues remain. All the essential facts were found by the district court, and these findings were affirmed by the court of appeals. (*E.g.*, A-47, 56) But the court of appeals made serious errors of law, which CCI seeks to overcome by a misleading presentation of the facts to this Court.

CCI's Misleading "Conspiracy" Theory

In an effort to make BPC's two technical violations seem more significant, CCI tries to picture all the defendants as members of a continuing conspiracy seeking its defeat. The picture simply is not true. The alleged violations by the Piper family took place in January 1969, when BPC had never met the Pipers and had no interest in Piper. (App. 312A-15A) BPC first met with the Pipers late in April, at what CCI artfully calls a "summit conference" (CCI Brief at 9), and only then began its quest for Piper shares. (A-14; App. 316A-26A,

1815A-22A) CCI's case against BPC, Salgo, and Wallace is based solely on two alleged violations by BPC in its own pursuit of shares, not on any alleged BPC interference with CCI's pursuit. Both of these violations are misleadingly described in CCI's Brief.*

CCI's Misstatement of the Rule 10b-6 Issue

CCI says, over and over, that it "obeyed" while BPC "defied" the SEC and its own counsel, but this assertion is misleading as to CCI and false as to BPC. What actually happened, in chronological order, is as follows:

In December 1968 and January 1969, CCI made substantial cash purchases of Piper stock (A-9-10), but these all but ceased early in February when CCI ran out of cash and could only borrow money at an effective interest rate of 43.11%. (A-114-15) On February 27, 1969, CCI announced an exchange offer to Piper shareholders. Thereafter, CCI "violated" Rule 10b-6 (just as BPC has been held to have violated it) by purchasing a small number of Piper shares (9,100) for cash over the New York Stock Exchange, on the advice of distinguished

* CCI also implies violations not involved in this case. BPC made a perfectly lawful contingent agreement to pay the Piper individuals an additional amount per share to give them the same amount it was offering to all other Piper shareholders ($80 per share). (A-14-15) CCI tries to cast a shadow on this agreement by calling it a "bonus" and then implies (CCI Brief at 10-11) that the Pipers and BPC both concealed this agreement when in fact BPC described the agreement fully in its exchange offer prospectus (A-40 n. 17; EV 30-31) and had nothing to do with what the court of appeals called the Pipers' "harmless" (A-63) omission from their communications with Piper shareholders. CCI also seeks to make something of BPC's announcement that it would offer securities valued at $80 per Piper share, despite the findings below that the announcement was truthful, was not material, did not damage CCI, and offered no basis for liability. (A-42-43 & n. 19)

counsel that such purchases were lawful.* (A-13; App. 401A)

On April 7, 1969, the SEC staff summoned CCI to a private meeting and told it that in the staff's view CCI's purchases since February 27 had been in violation of Rule 10b-6. CCI likes to imply that after April 7 it followed the staff's advice and was hurt, but the fact is that because of its cash shortage CCI had not been able to make more than trivial purchases for more than two months before its private warning.

On April 20, 1969, BPC began its quest for control of Piper. BPC did not know of the SEC staff's position. (C-30-31) There was then no public indication that the SEC staff thought purchases of a target company's stock by an exchange offeror violated Rule 10b-6. (C-45) Nor was there ever any private SEC staff warning to BPC, as there had been to CCI.**

An April 23 BPC strategy memo listed certain large blocks of Piper stock that would be worth pursuing. CCI tries mightily (Brief at 11-12) to leave the impression that there was something improper about this strategizing, but on April 23 BPC had received no hint of any kind that it should not seek these shares.*** Moreover,

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* On the theory of the court of appeals in this case, if CCI had achieved a less-than-9,100 share majority of Piper shares, it would now be liable to BPC for at least $36 million.

** The only explanation for this was offered by CCI's counsel, who said in oral argument below, "the SEC goofed, they forgot to tell them." *Piper Proves Elusive Prize*, Business Week, Aug. 16, 1969, at 64.

*** CCI seems fond of using the name "Cornfeld," especially in bold face type. The fact that the mutual fund from which BPC purchased some Piper shares had been managed by Bernard Cornfeld has nothing to do with this case. Even less excusable is CCI's dropping the name "Voloshen," CCI Brief at 73 n. *, after the district court barred evidence concerning that name on the ground that Salgo's alleged contacts with him had no connection whatever with this case. (App. 46A-1)

on April 23, BPC was contemplating a cash tender offer, not an exchange offer (App. 317A, 383A), and if it had made a cash offer its purchases would not have violated Rule 10b-6 under any theory.

It was not until May 5 that the SEC announced its *proposed* Rule 10b-13, in a release including the statement that one provision of the proposed rule was "in effect, a codification of existing interpretations under Rule 10b-6 . . . ." That statement, which is the only "warning" that BPC or its counsel ever received, turned out to be untrue.* No one (not even the SEC in its Brief in this Court) has ever pointed to any prior published statement by the SEC or its staff suggesting that Rule 10b-6 could be so interpreted. (C-16, 45)**

Shortly after May 5, as CCI backhandedly acknowledges (CCI Brief at 13), BPC's inside counsel and outside counsel both advised BPC that in their opinion the May 5 release was wrong about Rule 10b-6 and BPC could lawfully make cash purchases of Piper stock. (App. 1644A-46A) BPC's inside counsel nevertheless cautioned management that it would be prudent to make only unsolicited, off-exchange purchases that would clearly conform to the spirit of the large block exemption from Rule 10b-6. *Id.*

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* Contrary to what CCI implies (CCI Brief at 32) it was in the face of the May 5 Release that Chief Judge Lumbard said that BPC was an "innocent party" (C-30 n. 4) that "did not then know of any rule or interpretation precluding the transactions . . . ." (C-22)

** The purpose of Rule 10b-13 as stated in the May 5 Release was to prevent tender offerors from paying some shareholders of the target company more (or less) in non-tender-offer purchases than the tender offer price. SEC Release No. 34-8595 (May 5, 1969). Rule 10b-13 itself did not become effective until October 8 and is not applicable to this case. SEC Release No. 34-8712 (Oct. 8, 1969). CCI's case, of course, has never been based on any such discrimination, and there was no discrimination in fact: the shares in question were all purchased at prices slightly (but only slightly) *less* than the $80 per share that BPC offered to the public. (A-16)

Between May 14 and May 23, BPC made three cash purchases of large blocks. The district court said, as to these purchases:

> If we lay the transactions complained of against the intent behind the words of the exemption provisions [for large block purchases] it becomes clear that the block purchases fell within the intent of the exemption, if not within its words. (A-151)

Although the court found, after the fact, that BPC's large block purchases were not "within the words" of the large block exemption, there is no basis in the record for CCI's repeated but false assertion that BPC defied either the SEC or its own experienced counsel. As CCI's Brief reluctantly admits, the district court found "that the purchases were innocent." (CCI Brief at 33) And two of the three judges in the court of appeals, while predicating liability on the technical violation, expressly accepted the district court's findings (A-150-53) that there was neither manipulative intent nor manipulative effect. (Gurfein, A-96; Mansfield, A-111)

CCI's Misstatement of the BAR Issue

CCI's description of BPC's only other alleged violation, the BAR omission, seeks to leave the impression that BPC incurred or anticipated a loss on its investment in the BAR, which it then concealed. This was the theory of CCI's complaint, but it was flatly rejected both by the district court ("the evidence . . . unequivocally negates any such purpose or plan," D-11; *see* A-143) and by the court of appeals. (A-47)

BPC's carrying value for its BAR investment was $18.4 million, a figure derived (as stated in note 1 to the balance sheet in the 1969 exchange offer prospectus, EV 99) from a 1965 "market price evaluation." No court ever ruled either that the 1965 derivation of that

figure was wrong or that the suspended 1969 negotiations should have caused BPC either to record a loss on its income statement or to reduce the carrying value of the BAR on its balance sheet.* What the district court and the court of appeals both said was that since the figure was based on an earlier appraisal, BPC should have disclosed the negotiations as circumstances indicating that the appraisal was "obsolete." (A-43-47, 122, 142-45; D-14)

The district court flatly and repeatedly found that the failure to disclose those circumstances involved no intent to mislead anyone (D-14) or "improper purpose" (*id.*) or "bad faith." (*Id.*) On these grounds, it denied the SEC's request for an injunction against future violations (D-17), and CCI's bid for money damages. (A-143-44) The court of appeals, for all the general and somewhat inconsistent discussion in all three opinions of the meaning of "scienter," flatly agreed with the district court's findings of fact: "Nor does the evidence show that BPC failed to disclose the sales negotiations in bad faith." (Timbers, A-47); "[I]ntent to defraud has not been shown . . . ." (Mansfield, A-103); "[the finding that] there was no intent to mislead on the part of BPC in carrying BAR at $18.4 million on the balance sheet . . . [was] supported by substantial evidence [and] cannot be rejected by us." (Mansfield, A-118-119)

The courts below found simply that the $18.4 million figure should have been accompanied by "[s]ome caveat or reference to the negotiations" (Mansfield, A-122), and that BPC's failure to do so might have been misleading but was not in bad faith. The courts below expressly

* To the contrary, Judge Mansfield pointed out, concurring, that an immediate writedown might be "misleading," and that "a person able to read a balance sheet would probably have recognized that such 'historical' cost did not necessarily represent current liquidating value." (A-122-23)

rejected CCI's claim that there was a "BAR loss" to announce.*

CCI's attempt to portray the later sale of the BAR as "bad news" for BPC (CCI Brief at 23 n. *) is also misleading. The BAR, which at the $18.4 million figure accounted for 6% of BPC's assets, was shown in the exchange offer prospectus as having had less than $60,000 of net income in the previous year (1968), about 1% of BPC's 1968 income.** (EV 47, 60) The eventual sale of the BAR, although it involved an "extraordinary" loss for book purposes (*see* D-6), was apparently not regarded by the market as an unfavorable development, since the price of BPC's stock went up. (App. 591A) This fact alone confirms the district court's conclusion that there was "no purposeful connection between the nondisclosure and the contest for control." (D-14)

CCI's Misstatement of the Causation and Damages Issues

Although CCI repeatedly accuses petitioners of "speculation" because they ask that CCI prove causation of injury, it was CCI's $36 million judgment that required a whole series of unwarranted speculations. The court of appeals' judgment necessarily rests on the premises that absent the BAR omission the tendering Piper share-

* CCI misquotes the district court on this critical point. It has the court saying that "[d]isclosure 'would involve the loss [of] ($4.32 per share) . . . .'" (CCI Brief at 19) But the intended implication, that the district court believed BPC should have reported such a loss, is false. What the district court actually said was that the *possible* sale, which the court had just found BPC had *not* agreed to, would have involved a loss of that amount. (*See* D-15) The disclosure required by the district court (D-14) and the court of appeals (A-45, 122-23) would not have involved any loss or writedown.

** Even 7% interest on the $5 million offered and eventually received on the sale of the BAR would have produced pre-tax income of $350,000 per year.

holders would have rejected BPC's exchange offer; that, in addition, the violations "actually reversed the outcome" (CCI Brief at 80) of the contest for control of Piper (for otherwise CCI would have been stuck with the same "albatross" it now complains of); and that a share in a control block would have been worth at least $64. Reaching these premises requires the substitution of speculation for proof at every stage.

The district court, having applied a "might have hesitated" standard of materiality (D-15), found no proof that the BAR omission influenced any tendering Piper shareholder. (A-145) But the court of appeals substituted an irrebuttable presumption that BPC's offer would not "have attracted any takers." (A-60)

The district court (A-145) and the court of appeals (A-56) found no proof that CCI would have gained control under any circumstances. CCI had "'shot its bolt' in the financial sense," by early February. (A-114) But in this Court CCI injects the speculation of its own witness that it would have had a "99-1 assurance of victory." (CCI Brief at 23) The district court specifically rejected this speculation "as a matter of business experience and common sense in a situation where there is a bidder with greater resources at his command." (B-64 n.18)

The courts below found *after* both of BPC's violations that CCI was "still in a position" to gain control of Piper (C-47) and that CCI had not alleged that BPC's violations had placed it "at any real disadvantage." (C-9) But CCI here speculates that BPC's 4% lead would have been "virtually unbeatable" (CCI Brief at 22) even if CCI had not voluntarily "withdr[awn] from the struggle." * (B-7)

* This speculation is based on the absurd argument that because BPC had a 45%-41% lead it "could pay double the price per share

Finally, CCI's whole award is based on the unsupported and unwarranted speculation that if it had gained control its shares would have been worth $64 each and would have remained at that value. In fact, the district court found that a control share would have been worth only $52.80 on September 5, 1969 (B-57, 70), and there was a broad, sharp market decline in the prices of light-aircraft stocks after that, for which CCI was improperly compensated by the court of appeals.

REPLY TO CCI'S ARGUMENT

I. CCI Has No Cause of Action for Damages Under Rule 10b-6

CCI virtually concedes (Brief at 55-56) that it cannot maintain a damage action under Rule 10b-6 because it was neither a buyer nor a seller within the meaning of *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975). CCI pleads for an exception, on the ground that public policy forbade it from buying Piper shares, but this plea, already rejected by the "no exceptions" language in *Blue Chip Stamps*,* also deliberately avoids the point. The securities in distribution, whose purchasers were protected by Rule 10b-6, were not the Piper shares that CCI could not buy but the BPC securities offered in exchange. CCI never accepted the exchange offer.

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that Chris-Craft could." (CCI Brief at 23) What either bidder could afford depended on its resources, not its Piper holdings, and one bidder willing and able to pay $1 more than the other would get every share. BPC had, of course, paid for its lead, including approximately $80 for each of the challenged shares. CCI's effort to excuse its voluntary withdrawal is directly refuted by both logic and the findings below.

* "We do not believe that such a shifting and highly fact-oriented disposition of the issue of who may bring a damages claim for violation of Rule 10b-5 is a satisfactory basis for a rule of liability imposed on the conduct of business transactions." 421 U.S. at 755.

CCI nowhere disputes (and the SEC expressly acknowledges, see p. 55, *infra*) the fact that the only purpose of Rule 10b-6 was to protect purchasers of the securities in distribution from abnormal market pressures on the price during distribution. As a competing offeror who neither purchased securities in distribution by BPC nor tendered Piper shares pursuant to BPC's exchange offer, CCI falls outside the class of persons that Section 10(b) and its rules were designed to protect, and suffered no harm they were intended to prevent.*

Little more need be said (see BPC's Brief at 34-36) about CCI's extraordinary attempt to avoid *Blue Chip Stamps* by asserting, in this Court for the first time, that BPC's purchases violated Section 14(e).** It is ironic that on the scienter issue, CCI shrugs off BPC's lack of intent to manipulate the market in any security and the finding that there was no manipulation in fact by contending that Rule 10b-6 is a "*per se* rule." (CCI Brief at 33) *Per se* rules have a singular need to be read with precision, and this Rule states that its own purpose is limited to the implementation of terms "as used in section 10(b)," a section enacted solely for the protection of purchasers and sellers. BPC's purchases did not violate any rule under Section 14(e), *per se* or otherwise, and since they were not manipulative in fact, they could not have violated the statute itself. *Cf. TSC Industries, Inc.* v. *Northway, Inc.*, 96 S. Ct. 2126, 2140 (1976).***

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* CCI's claim that it was injured by its own obedience to Rule 10b-6, because it was thereby prevented from buying Piper shares, is belied by the facts. *See* p. 4, *supra*.

** The SEC's failure to mention this theory in the 32-page discussion of Rule 10b-6 in its amicus brief is eloquent.

*** Congressman Moss, cited by CCI (Brief at 57 n. **) as recognizing an "overlap between the Williams Act and Section 10(b)," actually said that passage of the Williams Act would neither approve nor disapprove "any suggested rules under Section 10(b). That Section stands on its own feet." 114 Cong. Rec. 21484 (1968).

[Footnote continued on page 12]

II. CCI Has No Cause of Action for Damages Under Section 14(e)

The question presented is whether Congress meant CCI, a takeover aspirant, to have a cause of action in that capacity for damages under Section 14(e). None is provided for in the statute, so the only question is whether a congressional intention to create a cause of action in damages for a losing aspirant can be found.

CCI does not deign to discuss the lengthy analysis in *Cort* v. *Ash*, 422 U.S. 66 (1975), where this Court, only a year ago, carefully reexamined the principles governing the implication of private damage actions under federal statutes, and used examples from cases decided under the securities laws.* Instead of analysis, CCI throws up a snowstorm of irrelevant materials. But it cites virtually no authority of any kind for the proposition that persons other than the target company and its shareholders have implied rights to seek damages under

*** [Continued]

And the testimony that CCI cites (Brief at 57 n. **) as "specifically" mentioning Rule 10b-6 points in quite the opposite direction: the witness suggested that the SEC use Rule 10b-6 as an "analogy" in drafting a new rule under Section 14(e) that would prohibit purchases of the target company's shares by management (seeking to defeat a cash tender offer) or sales by a tender offeror (seeking to depress the price). *Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 131 (1967) (hereinafter cited as *Senate Hearings*). This testimony hardly suggests that the witness (much less Congress) thought either (a) that purchases of target stock by a tender offeror could be manipulative or (b) that Rule 10b-6 already covered the problem.

* CCI's only comment on *Cort* (CCI Brief at 55) is that it did not overrule *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), but counsel as competent as CCI's must know that this does not resolve the point in issue. In *Borak*, unlike this case, the plaintiff was within the "especial" class of persons the statute was plainly intended to protect, and the Court recognized a private cause of action in his favor; in *Cort*, the plaintiff was not a member of the especial class, and the Court rejected his right to sue. *See* BPC Brief at 39-40.

Section 14(e). The only two lower court cases in point—*Nicholson File* and *Klaus*—split on the standing issue. The case partly in CCI's favor *(Nicholson File)* states clearly that Congress was concerned with protecting target shareholders, not rival offerors, and that damages to a tender offeror should be denied if, as is true here, an award would subvert that purpose. Before turning to those cases * and the real issue, we take up CCI's groundless and irrelevant arguments.

A. *The Supposed Parallel with Section 14(a)*

CCI argues that a takeover aspirant must have an implied cause of action for damages under Section 14(e) because a company seeking to acquire a target by merger would have a cause of action under Section 14(a), the proxy provision. (CCI Brief at 40-42) The short answer to this argument is that its premise is false: although the question is not before the Court, there is no authority whatever for the proposition that merger suitors can sue in that capacity for damages under Section 14(a).

The only case CCI cites for the proposition that "rivals" have standing under Section 14(a) is *Union Pacific R.R.* v. *Chicago & N.W. Ry.*, 226 F. Supp. 400 (N.D. Ill. 1964), in which the only relief sought was an *injunction* mandating resolicitation of proxies and the so-called "rival" was one of several plaintiff stockholders of the target company, all of whom were afforded standing.**

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* *See* pp. 19-21, *infra*.

** In what was at best an alternative holding, Judge Julius Hoffman said that since the plaintiff was also a party to the contract the shareholders were being asked to approve, it had a sufficient interest to have standing to request an injunction, particularly since it was joined by individual stockholder plaintiffs. 226 F. Supp. at 406. CCI's assertion that the *Union Pacific* case was "cited with approval" by this Court in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 385 (1970), conceals the fact that the citation was for an unrelated point.

Nothing in the case remotely suggests that if, for example, proxy materials paint a misleadingly rosy picture of a proposed merger that is then consummated, a disappointed rival suitor can recover damages under Section 14(a), out of the pockets of the former target shareholders who are now shareholders of the merged company, on account of the rival's lost opportunity to pursue its competing merger proposal.

CCI's assertion (Brief at 40) that "management has standing" is false under both Section 14(a) and Section 14(e), and the cases CCI cites do not support it.* No case has ever held, under either section, that the directors and officers of a corporation can recover damages for injury to themselves—such as the loss of fees and salaries if they are denied their positions by a successful takeover. To the contrary, Section 14(a) and Section 14(e) were both designed to provide protection only to the stockholders whose proxies or tenders are at stake, and only they, or the target company on their behalf, can properly recover damages under either section.

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* *Studebaker Corp.* v. *Gittlin*, 360 F.2d 692, 695 (2d Cir. 1966) and *General Time Corp.* v. *Talley Industries, Inc.*, 403 F.2d 159, 161 (2d Cir. 1968), *cert. denied*, 393 U.S. 1026 (1969), hold only that the target company may seek injunctive relief to protect the voting process, *not* that management can recover damages for injury to itself. *Greater Iowa Corp.* v. *McLendon*, 378 F.2d 783, 794 (8th Cir. 1967), also held simply that the target corporation itself had standing "to enforce compliance" with the proxy rules. Before reaching that point, the court held that neither the target company, nor directors, nor shareholder plaintiffs had standing under Sections 12 or 17(a) of the 1933 Act or Section 10(b) of the 1934 Act to complain that *other* shareholders were unlawfully solicited to join a voting trust, even though the plaintiffs were the persons injured. *See also Bound Brook Water Co.* v. *Jaffe*, 284 F. Supp. 702, 705 (D.N.J. 1968).

Thus, CCI's contention (Brief at 60) that failure to award a damage remedy to an offeror would "tip the balance" in favor of management is false, and, contrary to CCI's assertion (Brief at 60), BPC has never stated that management can sue for damages on its own behalf.

B. *The Legislative History of Section 14(e)*

CCI's contention that the legislative history reflects a "dual policy of protecting shareholders and rival contestants" (CCI Brief at 39) is without foundation. CCI has found nothing—*nothing at all*—in the Williams Act, the reports on it, the 1970 amendments to it, the reports on them, the statements of the sponsors of the legislation, or of any other member of Congress or the Executive Branch, or the statements of any representative of the SEC,* suggesting an intention to provide any private cause of action for damages under Section 14(e) at all, let alone a cause of action in favor of a competing offeror.

The only solicitude shown for tender offerors, in any of the legislative materials cited by CCI, is that the regulatory and disclosure *burden* imposed on them not be so great as to prevent tender offers or provide a weapon to entrenched management. CCI first quotes former Chairman Cohen's 1966 statement that the SEC agreed with the principle of the Canadian tender offer law that any regulations imposing a disclosure burden should not "unduly impede potential bidders." ** CCI

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* What CCI calls "contemporaneous and consistent construction of a statute by the agency charged with its enforcement" (CCI Brief at 48-49), turns out to be three amicus briefs in cases decided after the Williams Act was passed, of which only the one in this case actually discussed the question whether an offeror has standing to seek damages under Section 14(e). That SEC lawyers *later* argue in court that Section 14(e) created a damage remedy is neither legislative history, *see, e.g., Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132-133 (1974), nor expert agency interpretation. *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 627-28 (1971).

** CCI Brief at 38, *quoting* Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock*, 22 Bus. Law. 148, 152 (1966). The further citation of former Chairman Cohen (CCI Brief at 39) is actually to testimony that "The Commission's principal concern . . . is with these public shareholders." *Senate Hearings* at 205.

then quotes the Committee Reports' statement that the Williams Act avoided "tipping the balance of regulation" while requiring "full and fair disclosure for the benefit of investors." * Finally, CCI quotes this Court's statement in *Rondeau* that the Williams Act was not intended "to provide a weapon for management to discourage takeover bids . . . ." ** But none of the quotations (nor anything else in the legislative history) suggests any new right or remedy for tender offerors, and none of them was concerned with damage remedies or what classes of plaintiffs could seek them.

C. *CCI's Irrelevant Cases and Materials*

Several of CCI's supposed authorities suggested only that it would be appropriate to imply a private damage remedy in favor of the target company shareholders, the especial class whom the statute was designed to protect. This is the only point of the remarks of Professors Israels and Painter (cited, CCI Brief at 42).*** It is the only inference that could possibly be drawn from any "presumption" that Congress was aware of the *Borak* case. (CCI Brief at 42) It is the only relevance of *Sargent* v. *Genesco, Inc.*, 492 F.2d 750 (5th Cir. 1974) (cited, CCI Brief at 51), which held that *only* those target security holders "to whom the offer is addressed" have a damage action and that even holders of target com-

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* CCI Brief at 39, *quoting* S.Rep. No. 550, 90th Cong., 1st Sess. 3 (1967) ; H.R.Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968).

** CCI Brief at 39, *quoting* 422 U.S. at 58.

*** The written submissions of these two private witnesses are the only places in the legislative history where private remedies are even mentioned. No member of Congress ever asked about or acknowledged the quoted remarks. *Cf. Hochfelder*, 96 S.Ct. at 1386 n. 24. *See also* pp. 57-59, *infra.*

pany securities of a different class may not sue. *Id.* at 769.*

Apart from its comments in *Rondeau*, 422 U.S. at 60, this Court has not considered the question whether Congress intended that even target shareholders may seek damages under Section 14(e). But this case presents the much easier question whether Congress intended that a competing offeror may obtain damages in that capacity, particularly at the expense of members of the protected class who exchanged their shares for securities of the company being sued. The answer to that question, under *Cort*, is plainly no.

CCI also cites two cases holding only that the target company has a sufficient interest (including protection of its shareholders, the basic statutory objective) to seek injunctive relief under Section 14(e) to "enforce duties

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* A great many of CCI's citations have to do only with the special "*Birnbaum*" problem of the nontendering shareholder, which has nothing to do with this case. CCI (as noted in BPC's Brief at 45) did not sue as a tendering or nontendering shareholder for damages in either capacity. Nontendering shareholders of the target company cannot sue under Rule 10b-5 because they are not purchasers or sellers. Judge Friendly has suggested that Section 14(e), by eliminating the "purchase or sale" language, extended protection to all target shareholders. That is the point of the language CCI quotes (CCI Brief at 47) from *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 940-41 (2d Cir. 1969). It is the only point of *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579, 596 n.20 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974) (cited, CCI Brief at 51), which merely upheld the standing of a nontendering shareholder. And it is the only apparent relevance of *Dyer* v. *Eastern Trust & Banking Co.*, 336 F. Supp. 890 (D. Me. 1971) (cited CCI Brief at 52-53), which held only that a shareholder of an offeror could sue his own company. It is also the only relevance of the following materials, none of which even mentions suits by offerors: Kennedy, *Tender Moment*, 23 Bus. Law. 1091, 1114 (1968) (cited, CCI Brief at 44, again at 46, again at 53); Krasik, *Tender Offers: The Target Company's Duty of Disclosure*, 25 Bus. Law. 455, 458 (1969) (cited, CCI Brief at 45, again at 53-54); R. Jennings & H. Marsh, *Securities Regulation: Cases and Materials* 937 (3d ed. 1972) (cited, CCI Brief at 53).

created by statute" and thus help "accomplish the purposes of the legislature." *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 946 (2d Cir. 1969); *see Butler Aviation International, Inc.* v. *Comprehensive Designers, Inc.*, 425 F.2d 842, 843 n.1 (2d Cir. 1970).* But permitting the target company or persons not within the protected class to seek injunctive relief to enforce the disclosure policy articulated by Congress does not raise the same policy issue as would permitting damage actions by such persons, because "100 injunctions are no more effective than one," *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 261 (1972), and a private injunction has the same purpose and effect as an SEC injunction. Here, the question is whether there is *any* congressional policy of providing monetary redress for injuries alleged by offerors and others outside the protected class, particularly out of the pockets of some of the target shareholders. Neither *Electronic Speciality* nor *Butler* suggested that management, let alone an offeror, could recover damages for an injury suffered in that capacity.**

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* The three lower court "precedents under Section 13(d) of the Williams Act," cited by CCI (Brief at 53) as analogous to its position here, support only injunctive relief to compel compliance with the terms of the statute and are carefully limited to that relief. *See GAF Corp.* v. *Milstein*, 453 F.2d 709 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972); *Alaska Interstate Co.* v. *McMillian*, 402 F. Supp. 532 (D. Del. 1975); *Jewelcor Inc.* v. *Pearlman*, 397 F. Supp. 221 (S.D.N.Y. 1975).

Several of the articles cited by CCI also mention nothing more than injunctive actions by the target company. *See* Hamilton, *Some Reflections on Cash Tender Offer Legislation*, 15 N.Y.L.F. 269, 291-92 (1969); Young, *Judicial Enforcement of the Williams Amendments: The Need To Separate the Questions of Violation and Relief*, 27 Bus. Law. 391, 398-99 & n.30 (1972); Note, *Current Problems Under the Securities Acts—The Expanding Uses of Rule 10b-5*, 10 B.C. Ind. & Com. L. Rev. 313, 333-34 (1969).

** The other two members of what CCI likes to call the "*Crane-Electronic Specialty-Iroquois-Butler* quartet" are Rule 10b-5 cases irrelevant here. In *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970), the

D. *The* Nicholson File *and* Klaus *Cases*

In sum, despite CCI's bold declaration (Brief at 49) that Congress "did not reject these precedents on standing" when it amended the Williams Act in December 1970, CCI has found *no* precedents for the proposition that anyone other than a target shareholder could sue for damages under Section 14(e).* Since that time, apart from the present case, exactly one partial precedent

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court granted a tender offeror a damage action under Rule 10b-5 under a "forced seller" exception to the *Birnbaum* rule. In *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F.2d 963 (2d Cir. 1969), *cert. denied*, 399 U.S. 909 (1970), the court denied a tender offeror standing to sue for damages under Rule 10b-5. In both cases, the Second Circuit speculated that Section 14(e) *might* afford standing in future cases, but the question was not involved in either case.

Almost all of the secondary materials cited by CCI that mention suits by offerors suggest no more than injunctive relief to enforce congressional policy, not damages in favor of the offeror. 1 A. Bromberg, *Securities Laws, Fraud: SEC Rule 10b-5* (1975), says, "[T]here is nothing in the legislative history [of Section 14(e)] to show that Congress was particularly concerned to protect the offeror." *Id.* at § 6.3(1040). Note, *The Williams Amendments: An Evaluation of the Early Returns*, 23 Vand. L. Rev. 700 (1970), says the "difficulties involved appear to preclude the award of damages as an appropriate remedy." *Id.* at 722. *See also* Binder, *The Securities Law of Contested Tender Offers*, 18 N.Y.L.F. 569, 627-30 (1973); Bromberg, *The Securities Law of Tender Offers*, 15 N.Y.L.F. 462, 554-55 (1969); Mundheim, *Tender Offers*, 2 Rev. of Sec. Reg. 953, 956 (1969); *Takeover Bids (Proceedings of Meeting Held in Lloyd's Writing Room, London on Tuesday, 20 July, 1971)*, 27 Bus. Law. 243, 250 (1971); Swanson, *S. 510 and the Regulation of Cash Tender Offers: Distinguishing St. George from the Dragon*, 5 Harv. J. Legis. 431, 444 (1968); Note, *Cash Tender Offers*, 83 Harv. L. Rev. 377, 398-99 (1969).

* Of the 25 books and articles cited by CCI on the implied cause of action issue, only one published before *Chris-Craft II* suggested without qualification that offerors could recover damages under the Williams Act; and even that article (not mentioned on this point in the legislative history) made only a casual reference to the question. *See* Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. Pa. L. Rev. 317, 363 n.183 (1967).

has appeared, along with one square holding to the contrary.

In *H. K. Porter Co.* v. *Nicholson File Co.*, 482 F.2d 421 (1st Cir. 1973), the court affirmed the denial of a motion to dismiss a tender offeror's complaint for damages against the target company. But the court went on to recognize, in a way that would require reversal here, that the target company shareholders are the "overriding" beneficiaries of the Section and that any damage award must bear that in mind:

> It follows, however from the overriding investor-protection purpose of § 14(e) that damages should be denied to a tender offeror to the extent that they are inconsistent with that purpose. The statute, in other words, may not be diverted from one designed to assist the investor to one operated principally to benefit one or another of the rival management or control groups jockeying for power.
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> . . .
>
> In the event Porter [the offeror] establishes a violation of § 14(e), the district court should make findings of the probable impact of recovery from Nicholson on its shareholders. Any recovery in damages from the corporation must be consistent with the primary congressional aim of protecting investors, and the district court would be warranted in denying damages, otherwise established, if it should conclude that to award them would be to subvert that purpose. *Id.* at 424-25.

The same considerations apply here, where a tender offeror seeks damages against a competing offeror (BPC), and a judgment would injure the target company share-

holders who accepted BPC securities under its exchange offer.*

Moreover, the court in *Nicholson File* did not have the benefit of this Court's later rulings in *Rondeau* and *Cort*, reaffirming that standing to seek damages must be limited to the intended beneficiaries of a statute and to wrongs "redressable under its provisions." The Ninth Circuit did have those cases before it when it decided *Klaus* v. *Hi-Shear Corp.*, 528 F.2d 225 (9th Cir. 1975). In *Klaus*, the Ninth Circuit, citing this Court's decision in *Rondeau*, ruled that injuries to tender offerors like CCI are not remediable under Section 14(e) because that Section "was designed to protect . . . offerees, not offerors." *Id.* at 232. CCI seeks to dismiss this holding by asserting that plaintiff Klaus, the tender offeror, "was denied a preliminary injunction because of lack of a showing of irreparable injury." (CCI Brief at 54 n. *) But this misses the point. Klaus had shown irreparable harm to *himself*. What he had failed to show was "any harm to the *cash tender offerees* . . . that could not be compensated by money damages [to them]." 528 F.2d at 232 (emphasis added). In light of *Rondeau*, the Ninth Circuit held that while a tender offeror might in a proper case have standing to seek an injunction to prevent irreparable harm *to target shareholders*, it is harm to the shareholders alone that is redressable under Section 14(e). The necessary corollary is that a tender offeror cannot sue under Section 14(e) for damages it suffers in that capacity.

E. *Policy Considerations*

CCI would find, in the very silence of the statute and its legislative history on the subject, a congressional intent to create new private damage actions in favor of "all participants" in tender offer contests against all other

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* *See also* E. Aranow & H. Einhorn, *Tender Offers For Corporate Control* 297-98 (1973).

participants.* (CCI Brief at 36) To support this view, CCI resurrects the public policy of unlimited "vigorous enforcement" relied on by the court of appeals but rejected by this Court in *Blue Chip Stamps*, 421 U.S. at 748-49.

The real "public policy" question here is whether, in implying remedies not expressly provided, the federal courts should go beyond enforcing the statutory policy actually declared by Congress (protecting target shareholders) and find a congressional intent to create new federal causes of action in favor of "all participants"—actions that could take money away from some of the supposedly deceived shareholders Congress wanted to protect and award it to a competing tender offeror who unsuccessfully sought their shares. We submit that federal courts should not create a new federal cause of action for damages unless they have a clear basis for inferring that Congress intended to provide *this* means of redress, to *this* particular class of plaintiffs, for *this* particular harm. That is the plain holding of *Cort*, and it is fully supported by a proper view of the relationship between Congress and the federal courts on statutory issues.

Congress knows how to provide for private damage remedies for violation of a federal statute. It does not always choose to do so. Sometimes Congress provides only for private injunctive actions.** When Congress

* That is, of course, the opposite of the usual inference. *See T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959), holding that although the Motor Carrier Act prohibits carriers from making "unjust and unreasonable charge[s]," provisions for shippers to collect damages were "conspicuously absent," *id.* at 470, and no damage remedy was available.

** For example, Section 505(a) of the Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251, 1365(a) (Supp. V, 1975), expressly authorizes individuals to sue violators to enforce compliance with effluent standards, but it does not provide for damage suits, as

provides expressly for private damage remedies at all, it defines and limits them with a precision that is highly relevant here, and it indicates the class of plaintiffs who can sue, the injuries that will be redressable, the elements of the plaintiff's case, the standard of blameworthiness, the defenses available to avoid liability, the procedural protections to which the parties are entitled, and the measure of damages. Section 11 of the 1933 Act is an apt example. But we need not rely solely on the carefully defined limitations on the battery of express private remedies contained in the securities laws. *See generally Hochfelder*, 96 S. Ct. at 1388-89. For the clear congressional policy against providing a federal damage action to every private person injured by a violation of federal law is abundantly illustrated in other areas as well.*

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to which injured persons are expressly left to such remedies as may be available at common law or under other statutes. *See* S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971). The Act provides for civil penalties, but these are payable to the United States and would "not be recovered by the complainant." H.R. Rep. No. 911, 92d Cong., 2d Sess. 133 (1972). Section 20(a) of the proposed Toxic Substances Act (S. 3149, now in conference after passage by both Houses) similarly provides for private suits "to restrain such violation" but, despite the obvious possibility of tangible harm to individuals, it gives them no damage remedy. *See* 122 Cong. Rec. H8860 (daily ed. Aug. 23, 1976).

* For example, the Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975), provides a damage action for any consumer injured by a violation of the statute, *id.* § 110(d), 88 Stat. 2189, but expressly prohibits recovery of any damages for personal injury. *Id.* § 111(b)(2), 88 Stat. 2192. The Consumer Product Safety Act, 15 U.S.C. § 2051 *et seq.* (Supp. V, 1975), provides that "any interested person" may obtain an injunction to enforce product safety rules, *id.* § 2073, but that individuals injured by violation of a rule may recover damages only for "knowing (including willful)" violations, because Congress was careful to include a higher scienter requirement in the damage section. *Id.* § 2072.

The federal courts have been properly scrupulous to observe this congressional policy of carefully limiting private damage remedies when they are called upon to decide whether a damage remedy not expressly provided should nevertheless be implied. For example, because Congress provided only for federal enforcement and rejected a proposed provision for private damage actions, the courts have uniformly held that there is no private federal damage action for violations of the Food, Drug, & Cosmetic Act, 21 U.S.C. § 301 *et seq.* (1970).* Likewise, although the Lanham Act, 15 U.S.C. § 1051 *et seq.* (1970), provides for civil liability against any person who affixes "any false description or representation" upon a product on behalf of any person who is "damaged by the use of any such false description or representation," *id.* § 1125(a), the Second Circuit held on the basis of the general policy set forth in the statute and its legislative history that "any person" means only a trade competitor, not a consumer.**

Cort, *Rigsby*, and *Blue Chip Stamps* confirmed the policy that these lower court cases have applied. They reflect this Court's sound view that the only satisfactory substitute for express statutory guidance is a clear basis for inferring a congressional intention that a particular class of plaintiffs should have redress in damages for a particular type of injury.

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* *See Florida* ex rel. *Broward County* v. *Eli Lilly & Co.*, 329 F. Supp. 364 (S.D. Fla. 1971); *Clairol Inc.* v. *Suburban Cosmetics & Beauty Supply, Inc.*, 278 F. Supp. 859 (N.D. Ill. 1968); *Wells* v. *Wells*, 240 F. Supp. 282 (W.D. Ky. 1965).

** *Colligan* v. *Activities Club of New York, Ltd.*, 422 F.2d 686, 694 (2d Cir. 1971) ("had Congress contemplated so revolutionary a departure [as is] implicit in appellants' claims, its intention could and would have been clearly expressed").

There is, of course, a method in all of these careful distinctions that CCI would treat as madness. It was well expressed by Judge Leventhal:

> Judicial implication of ancillary Federal remedies is a matter to be treated with care, lest a carefully erected legislative scheme—often the result of a delicate balance of Federal and state, public and private interests—be skewed by the courts, albeit inadvertently.*

While "vigorous enforcement" of federal law through private damage actions by all affected persons may be a plausible public policy in some situations, it is not the only public policy for all situations. When a court creates an implied cause of action for damages in favor of a person who is not plainly within the "especial class" Congress intended to protect, it steps into a policy-making role that it is ill-equipped to fill.

Important policy issues, best resolved by Congress, are involved in deciding whether to create a new damage action and what its scope should be. In the situation presented by this case, those issues include (1) whether allowing damages to others than target shareholders suing in that capacity would open the door to a host of other claims, such as suits by displaced directors and management for lost fees and salaries; (2) the impact on innocent shareholders who accept an exchange offer of permitting suits by a competing offeror for unlimited damages against the company whose securities the innocent shareholders accept; (3) what the standard of blameworthiness and the measures of damages should be; (4) whether the inevitable deterrence of tender offers that arises when potential

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* *Holloway* v. *Bristol-Myers Corp.*, 485 F.2d 968, 989 (D.C. Cir. 1973) (private parties have no standing to enforce provisions of the Federal Trade Commission Act, 15 U.S.C. §§ 45, 52, 54 (1970)).

damage liability is expanded outweighs the benefits to shareholders that tender offers bring; (5) the supposed need for damage actions by tender offerors as a supplement to the expert agency's enforcement efforts—particularly in a case where the agency has itself obtained relief for the protected class; (6) the impact of increasing the workload of the federal courts; and (7) the significance in the federal system of duplicating or displacing state law.

In our Brief we cited the Clayton Act, 15 U.S.C. § 12 *et seq.* (1970), and *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972), to illustrate the caution with which Congress and this Court approach issues like those presented here. CCI tries to dismiss *Hawaii* on the ground that in the Clayton Act Congress itself expressly limited those it allowed to sue for damages to a narrower group than those it allowed to sue for injunctions, but "Congress made no such distinction in the securities statutes." (CCI Brief at 59 n.†) That daring assertion comes surprisingly close to the heart of the issue here, but CCI has the argument backwards. Congress was utterly silent about who, if anyone, could have a private remedy for a violation of the Williams Act, and it had no occasion to decide whether, if there were to be a private remedy, the class permitted to seek injunctions to enforce the law would be broader than the class of persons permitted to sue for damages for injury to themselves.

Hawaii illustrates that when Congress has faced this issue expressly,* it has allowed a much wider class to seek injunctions, while at the same time carefully limiting the type of harm redressable in damages and defining the class of damage plaintiffs more narrowly than all those

* The Consumer Product Safety Act is another example. See p. 23 n. **, *supra*.

consequentially damaged in fact.* *Rigsby*, *Cort*, and *Blue Chip Stamps* teach that when Congress has not created and defined an express private damage remedy, federal courts must be careful to imply such a remedy, if at all, only in favor of persons who are within the "especial class" the statute was intended to protect and who have suffered the harm for which the statute was intended to provide redress.

CCI disregards both classes of precedent. Instead, it offers the remarkable argument that because Congress gave no indication that it intended any private damage action at all under Section 14(e), this Court should not only infer that Congress intended one, but should also infer that, by its failure to state any express limitations on the action it did not expressly create, Congress intended that there be no limitations whatsoever on those who could bring such an action.

III. BPC Did Not Act With Scienter

CCI's only real attempt to answer BPC's scienter arguments is to stretch the facts of this case beyond recognition.**

A. *Rule 10b-6*

CCI does not even answer the argument that since *Hochfelder* required proof of "intent to deceive, manipulate, or defraud" to support a damage action under Section 10(b), such intent must obviously be shown to support a damage action under Rule 10b-6. Nor does CCI respond to the fact that the courts below found no in-

* As this Court observed in *Hawaii*, "[t]he lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." 405 U.S. at 262-63 n. 14. *See, e.g., Billy Baxter, Inc.* v. *Coca Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

** The SEC does not urge affirmance of the decision below on the scienter issue. *See* pp. 64-66, *infra*.

tent to deceive or manipulate and no deception or manipulation in fact. Instead, CCI repeatedly asserts that the admittedly "technical" violation (A-149) was made in disregard of warnings by the SEC and counsel. But apart from being insufficient to establish intent to manipulate, this assertion is wrong in fact: BPC acted in good faith reliance on the opinion of its counsel that the comment introducing *proposed* Rule 10b-13 was an incorrect reading of Rule 10b-6 and that Rule 10b-6 did not apply to purchases of target company stock. *See* pp. 3-6, *supra*. Neither this advice nor BPC's reliance on it was reckless. Indeed, the district court (Judge Tenney) (C-45) and the Chief Judge of the Second Circuit (C-28-31) shared the opinion of BPC's counsel.

B. *Section 14(e)*

This case presents the following scienter question: is mere awareness of circumstances that were omitted from an exchange offer prospectus because of a considered judgment that they were not material, but that were later found material by the court, equivalent to the scienter needed to support an action for damages, despite a finding, affirmed on appeal, that there was no intent to mislead and no bad faith? This Court, in *Hochfelder*, has already spoken to that issue under Section 10(b): intent to mislead is required. CCI tries to avoid the plain consequences of this holding, first by trying to reargue the facts, then by trying to turn this into a recklessness case, then by trying to rewrite *Hochfelder*, and finally by trying to draw a distinction as to the need to prove scienter (not perceived by the courts below or any other court) between Section 10(b) and Section 14(e).

1. CCI's Effort To Reargue the Facts

CCI tries to make it appear that the lower courts found something more than mere awareness of circum-

stances that no expert thought were material at the time but were later found material by the court. CCI repeatedly accuses BPC of "concealing [a] $13 million BAR loss." (CCI Brief at 64; *see, e.g., id.* at 35) But there was no "BAR loss" to report, and the courts below rejected CCI's charge of concealment. As Judge Timbers said, "The district courts' findings of fact, supported by substantial evidence, do not warrant the conclusions that BPC's officers had decided to sell the BAR before the exchange offer became effective and had postponed consummation in order to avoid disclosure." (A-47; *see* A-97-98; D-11-13)

BPC was held liable not for concealing a loss incurred or anticipated but for a failure to make an updating comment on a still-correct balance sheet entry. The critical item, note 1 to the financial statements in BPC's prospectus, merely explained that BPC's carrying value for the BAR was $11 million *less* than BPC's equity in the underlying BAR assets because of a 1965 "market price evaluation" of $18.4 million. (EV 99) There was no representation that this figure had any relationship to, much less that it equalled, the BAR's 1969 market value. BPC, with the concurrence of its independent auditors, applied to this special situation the normal rule that a balance sheet carrying value is only adjusted when there is a transaction or other definitive event establishing a new figure.

Although it ruled that BPC should have made an updating comment (not a writedown), the district court found that BPC had acted in good faith and without any intent to deceive anyone: "I find that Bangor Punta did not intentionally or purposefully mislead Piper Aircraft stockholders or the public or investors by the omission to make disclosure of the sale under consideration. . . ." (D-14; *see also* A-148) The court of appeals agreed with the district court that BPC had "no intent to mislead"

in failing to disclose the negotiations (A-118), and expressly affirmed that court's finding that there had been no "bad faith" on BPC's part. (A-47; *see also* A-37)

The court of appeals' judgment rested on its holding, squarely in conflict with this Court's subsequent decision in *Hochfelder*, that

> intent to defraud is not an indispensable element in a private action for damages under the antifraud provisions of the federal securities laws. (A-47)

The court then clearly articulated a "mere awareness" standard of liability:

> In sum, and put as simply as possible, the standard for determining liability under § 14(e) . . . is whether plaintiff has established that defendant *either* (1) knew the material facts that were misstated or omitted, *or* (2) failed or refused to ascertain such facts when they were available to him or could have been discovered by him with reasonable effort. (A-36-37) (Timbers, J.) (emphasis added)
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> [T]he law was aimed at misrepresentations or omissions involving *some degree of awareness* . . . . (A-105) (Mansfield, J., concurring) (emphasis in original)
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> * * *
>
> [T]he *scienter* requirement would be satisfied upon a showing that the person charged knew the material facts misstated or omitted and could reasonably have been expected to appreciate their significance, . . . *or*, if he did not know them, that he had reasonable cause to believe that there might be a material failure in disclosure and yet did not ascertain and disclose the facts even though he could have done so

> without any undue effort. . . . (A-105-06) (Mansfield, J., concurring) (emphasis added)

Later courts struggling with this language, including the Second Circuit itself, have characterized *Chris-Craft II* as invoking "a negligence standard," *White* v. *Abrams*, 495 F.2d 724, 732 (9th Cir. 1974), and as entailing "virtually absolute liability" for every corporation. *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1301 n.20 (2d Cir. 1973).

CCI simply ignores the court of appeals' formulation of the scienter standard, and attempts instead to suggest that the court found something called "knowledge of falsity." (CCI Brief at 66-67) But this is a mere play on words. The district court found and the court of appeals agreed that BPC had no intent to deceive; liability was premised on "mere awareness" of information later deemed material. In none of CCI's "knowledge of falsity" cases was a defendant held liable without the crucial element that was required by *Hochfelder* and is missing here: proof that the defendant intended to deceive the shareholders.*

2. CCI's Recklessness Theory

CCI alternatively contends (Brief at 68) that BPC was guilty of "recklessness," a term for which it offers no definition, in failing to disclose its BAR negotiations. But this simply is not a recklessness case. There were findings of no intent to deceive or bad faith. There was

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* CCI says (Brief at 74) that "Bangor was described [by the court] as making representations of value known to be 'deceptive and unrealistic' . . . ." What Judge Timbers actually said was that BPC acted "unreasonabl[y]" in not recognizing the significance of "circumstances that indicated that the book value of the BAR was deceptive and unrealistic." (A-48) The difference between the court's language, which sets forth essentially a negligence standard, and CCI's construction of that language is the very reason why *Hochfelder* requires this case to be reversed.

no allegation of recklessness in CCI's complaint, the case was not tried on a recklessness theory, and neither the district court nor the court of appeals found recklessness. Judge Timbers used the word "reckless" in discussing whether the BAR omission was within the discretion allowed to the authors of a prospectus (A-48), but this pre-*Hochfelder* use of the word was plainly not intended to suggest recklessness amounting to bad faith, because Judge Timbers had just agreed that the finding of an absence of bad faith was supported by the evidence. (A-47) In any event, Judge Mansfield explicitly rejected Judge Timbers' adjectives (A-117-122), and Judge Gurfein—writing for the court over Judge Timbers' dissent on the SEC injunction issue—affirmed the district court's denial of an injunction to the SEC even while noting that "sustained recklessness can be the basis for injunctive relief." * (A-99)

Hochfelder, of course, leaves open the question whether recklessness is ever a sufficient basis for imposing liability under the antifraud provisions of the securities laws. We argued in our Brief that it was not enough, under *Hochfelder's* rationale, except in a limited evidentiary sense. CCI scoffs at this (Brief at 69 n. *), but cites many cases illustrating that recklessness is nothing more than a verbal formulation that allows the trier of fact to infer from circumstantial evidence that the defendant intentionally violated the law.** That concept and

* The word "reckless" occasionally appears elsewhere in the court of appeals' opinions. Judge Timbers, dissenting in the SEC case, repeated his characterization (A-80 n.37); the points made in the text prevent any reliance by CCI on that footnote. In each other instance the word is used merely as part of a general discussion of different sorts of scienter, and plainly is not a characterization of the conduct involved in this case, as to which the "mere awareness" standard was expressly applied.

** *See, e.g., United States* v. *Natelli*, 527 F.2d 311, 322-23 & n. 9 (2d Cir. 1975), *cert. denied*, 96 S.Ct. 1663 (1976); *United States* v. *Brawer*, 482 F.2d 117, 128-29 (2d Cir. 1973); *United States* v.

the cases CCI cites are irrelevant here, because there was a finding of the district court, affirmed on appeal, that BPC did not act in bad faith or with intent to mislead.

In any event, *Hochfelder* itself makes it clear (*see* pp. 35-37, *infra*) that even if recklessness could ever be the sole basis for liability, the situation would have to involve conduct of such a high degree of blameworthiness that it is "tantamount to fraud." *United States* v. *Mackay*, 491 F.2d 616, 623 (10th Cir. 1973), *cert. denied*, 416 U.S. 972 (1974).* Dean Prosser explains that "recklessness" means

> that the actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the consequences, amounting almost to willingness that they shall follow; and it has been said that this is indispensable. Since, however, it is almost never admitted, and can be proved only by the conduct and the circumstances, an objective standard must of necessity in practice be applied. W. Prosser, *Law of Torts* 186 (4th ed. 1971) (footnotes omitted).

This Court has taken the same approach in the First Amendment libel cases concerning public figures, holding in *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968), that to find "reckless conduct" it is not sufficient to show

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Henderson, 446 F.2d 960, 966 (8th Cir. 1971); *Elbel* v. *United States*, 364 F.2d 127, 134 (10th Cir. 1966), *cert. denied*, 385 U.S. 1014 (1967). *Cf. United States* v. *Mackay*, 491 F.2d 616, 622-23 (10th Cir. 1973), *cert. denied*, 416 U.S. 972 (1974); *United States* v. *Simon*, 435 F.2d 796, 808-09 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970). *See generally Ultramares Corp.* v. *Touche*, 255 N.Y. 170, 190-91, 174 N.E. 441, 449 (1931) (Cardozo, J.).

* *See Coleco Industries, Inc.* v. *Berman*, Civ. No. 73-2790, slip opinion text at n.32 (E.D. Pa. Aug. 9, 1976) (*Hochfelder* requires intent to deceive or conduct "so reckless as to be virtually indistinguishable in its culpability from deliberate fraud").

that a reasonable man would have investigated further before publishing. There must be such reckless disregard for truth or falsity as to demonstrate "actual malice."

This plainly is not that case.* The record clearly indicates that the BAR negotiations were fully discussed with BPC's outside counsel, First Boston, and its outside counsel at a "due diligence" meeting in connection with the preparation of the exchange offer prospectus,** and with BPC's independent auditors. (App. 1656A-57A, 1759A-61A, EV 87) The information omitted did not affect the value of the securities being offered, which was found to be $80 per Piper share as promised (A-140), and did not affect the value of the common stock, which went up in price after the sale of the BAR was reported. (App. 591A) The district court not only found no "intent to defraud" but no "bad faith" or "improper purpose," and these findings were affirmed on appeal. (A-47; D-14) The BAR omission, said the district court, involved nothing more than a "mere negligent omission or mis-

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* A leading example of recklessness is the lawyer who, while pleading ignorance, has tried to "escape liability for fraud by closing his eyes to what he saw and could readily understand." *SEC* v. *Frank*, 388 F.2d 486, 489 (2d Cir. 1968). Judge Adams read *Frank* as (to quote CCI, Brief at 67 n. *) "strongly suggest[ing] that 'recklessness would be tantamount to willful fraud, from which intent could be inferred.'" *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255, 281 (3d Cir.), *cert. denied*, 409 U.S. 874 (1972). *See also Hertz Corp.* v. *Cox*, 430 F.2d 1365, 1374 (5th Cir. 1970) (fraud under Georgia law requires showing "that such representation was wilfully and knowingly false, and what the law regards as the equivalent of knowledge, a reckless or fraudulent representation about that which the party pretends to know, but about which he knows that he does not know, and by which false pretense *his purpose and intent is to deceive*") (emphasis in original partially omitted).

** It is simply false to imply (CCI Brief at 77) that First Boston's counsel was not involved in the decision not to disclose the BAR negotiations. *See* App. 1657A-61A. Indeed, *all* the facts on which the district court found the BAR violation were obtained from BPC's corporate minutes (D-5-12), which hardly suggests a concealment motive.

statement of fact." (A-148) And the court of appeals affirmed the denial of an injunction against future securities laws violations sought by the SEC, over Judge Timbers' dissent, despite the view of both Judge Gurfein and Judge Mansfield that recklessness would have been sufficient to support an injunction. (A-99, 122-23)

CCI seeks to dismiss the extent of consultation between BPC and its professional advisers, all of whom were widely experienced in the securities field, as a "scienter round-robin." (CCI Brief at 76) But even apart from the fact that no one has ever questioned the good faith of the lawyers and accountants, CCI's cliche entirely misses the point. The question here is whether BPC and First Boston can possibly be said to have been reckless in the sense left open by *Hochfelder*, and it is highly relevant that they consulted each other and each other's experts. During the summer of 1969 there had been no decision by BPC's directors to sell the BAR. The decision whether to speculate about a future disposition of stock or assets (which would be quite different transactions, *see* D-12) and, if so, what to say, was a complex one. BPC's consultation in good faith with First Boston and numerous professional advisers makes a finding of recklessness inconceivable under these circumstances. *See SEC* v. *Harwyn Industries Corp.*, 326 F. Supp. 943, 955-57 (S.D.N.Y. 1971); *cf. Linden* v. *United States*, 254 F.2d 560, 568 (4th Cir. 1958); *Kountze* v. *Kennedy*, 147 N.Y. 124, 41 N.E. 414, 415 (1895).

3. CCI's Effort To Rewrite *Hochfelder*

CCI tries to dismiss *Hochfelder* as holding only that an accountant cannot be held liable for failing to uncover a client's unusual procedure for handling correspondence. (CCI Brief at 63) But CCI belittles this Court to suggest that it granted certiorari in *Hochfelder* to announce that accountants need not read their clients' mail. This

Court took *Hochfelder* to resolve a longstanding conflict among the circuits over the degree of fault required for liability under Section 10(b). The Court ruled that Section 10(b) proscribes conduct "quite different from negligence," 96 S. Ct. at 1384, and that "it connotes intentional or willful conduct designed to deceive or defraud investors. . . ." *Id.* That ruling is not limited to the handling of mail or to the liability of auditors.

In *Hochfelder* this Court very carefully defined what it meant by the term scienter as a prerequisite for liability under the securities laws—"intent to deceive, manipulate, or defraud." * Unhappy with this definition because BPC could not be held liable under it, CCI seeks to substitute a looser definition by arguing that the "antecedents" of *Hochfelder* are consistent with the court of appeals opinion in *Chris-Craft II.* That claim—which rests on isolated quotations—seriously distorts the facts and holdings of those cases. In fact, in each case CCI cites (Brief at 66-67) the court either found the defendants not liable despite awareness similar to that possessed by BPC here,** or found defendants liable be-

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* This Court reiterated this formulation throughout its opinion: "We granted certiorari to resolve the question whether a private cause of action for damages will lie under § 10(b) and Rule 10b-5 in the absence of any allegation of 'scienter'—intent to deceive, manipulate, or defraud . . . . We conclude that it will not . . . ." 96 S. Ct. at 1381 (footnote omitted). *See also id.* at 1381 n.12 ("In this opinion the term 'scienter' refers to a mental state embracing intent to deceive, manipulate, or defraud"); *id.* at 1383 (language of the statute "strongly suggest[s] that § 10(b) was intended to proscribe knowing or intentional misconduct").

** *Lanza* v. *Drexel & Co.*, 479 F.2d 1277 (2d Cir. 1973); *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974); *cf. Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255, 291-301 (3d Cir.) (Adams, J., dissenting), *cert. denied*, 409 U.S. 874 (1972).

SEC v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 868 (2d Cir. 1968), *cert. denied sub nom. Coates* v. *SEC*, 394 U.S. 976 (1969), and *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1299 (2d Cir. 1973),

cause they had intentionally misled the plaintiffs.* CCI simply disregards the fact that two of the cases criticized by this Court in *Hochfelder*, 96 S. Ct. at 1381 n.12, on the ground that they set too low a standard of scienter, would have imposed liability on the same basis used by the court of appeals here: failure to disclose information known to the defendant and later found material, but without proof of intent to mislead. *Myzel* v. *Fields*, 386 F.2d 718, 735 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968); *Kohler* v. *Kohler & Co.*, 319 F.2d 634, 637-38 (7th Cir. 1963).

4. CCI's Effort To Rewrite Section 14(e)

Finally, CCI suggests that in any event scienter is not a necessary element of a cause of action for damages under Section 14(e). In making this argument, CCI places its principal reliance on the phraseology of Section 14(e), but it offers no evidence at all that the first half of the section is to be read out of context as referring to omissions made without an intent to deceive. To the contrary, the first clause of Section 14(e) is taken almost verbatim from Rule 10b-5(2), a parentage the SEC expressly acknowledges (SEC Brief at 17), where it has been held by this Court to refer only to fraudulent transactions.** CCI simply ignores the fact that both the

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cited by CCI for this point, were, of course, cases not involving damage claims under either Rule 10b-5 or Section 14(e).

* *Clegg* v. *Conk*, 507 F.2d 1351, 1362 (10th Cir. 1974) ("the conduct on which [defendant's] liability must have been predicated . . . was necessarily pursued knowingly and intentionally and with purpose to mislead").

** CCI attempts to characterize *Hochfelder* as reading clause (2) out of Rule 10b-5, on the ground that it goes beyond the statute, but that is the opposite of what the Court did. This Court found rather that when the SEC referred to omissions in Rule 10b-5(2) it *meant* omissions made with intent to defraud. 96 S. Ct. at 1390-91. This does not make superfluous the references to "fraud" in the

Senate and House reports describe Section 14(e) as being addressed to "fraudulent transactions." S. Rep. No. 550, 90th Cong., 1st Sess. 10 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 11 (1968). CCI likewise makes no response at all to the fact that every court that has considered the question, including the *Chris-Craft II* court, has concluded that actions under Section 14(e) are subject to the same scienter requirements as those under Section 10(b).* Finally, CCI overlooks the fact that its view of Section 14(e) as extending beyond fraud to merely negligent misconduct is at odds with the statutory framework of the securities laws, which this Court analyzed in *Hochfelder*. 96 S. Ct. at 1388-89 & n.29. (*See* BPC Brief at 65-68)

The only support CCI offers for its position is three quotations (CCI Brief at 70-71) from the hearings on the Williams Act that were concerned with an entirely different issue. The Williams Act's primary purpose

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second half of Section 14(e), and in Rule 10b-5(1) and (3). There are, as this Court has noted, other cunning devices. *Cf.* 96 S. Ct. at 1385.

* CCI's reliance (Brief at 70 n. *) on Judge Friendly's opinion in *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1299 (2d Cir. 1973), to support the proposition that Section 14(e) is more nearly analogous to the proxy rules than to Rule 10b-5, is particularly curious. In *Gerstle*, Judge Friendly expressly endorsed the premise of the *Chris Craft II* court that the scienter standard under Section 14(e) should be the same as that under Rule 10b-5, rather than that under the proxy rules.

CCI asserts (CCI Brief at 67) that Judge Friendly in *Gerstle* approved the *Chris-Craft II* definition of scienter, but there is no basis for the assertion. Judge Friendly, who did not participate in the *Chris-Craft* cases at any stage, was merely noting their verbal invocation of a scienter requirement. Nothing in the case before him required him to comment on the inadequacy of the *Chris-Craft II* legal formulation (particularly since *Hochfelder* had not been decided); nonetheless, he noted that the scienter test used in *Chris-Craft II* required only awareness of the omitted fact, and he recognized the "conceptual problem" inherent in that approach because it entailed "virtually absolute liability." *Id.* at 1301 n.20.

was to add new affirmative requirements for specific disclosures by tender offerors, by others acquiring substantial blocks of stock, and by persons opposing tender offers. In particular, new Section 14(d)(4) of the 1934 Act gave the SEC general authority to issue regulations affirmatively governing "[a]ny solicitation or recommendation to the holders of . . . a security to accept or reject a tender offer." Most of the discussion at the hearings, including CCI's three quotations, concerned the affirmative disclosure requirements and the SEC's need for new rulemaking power under Section 14(d)(4).

None of the remarks that CCI quotes was concerned with Section 14(e) at all. In the first of the three, former Chairman Cohen made it clear that he was discussing the rulemaking authority of the SEC under Section 14(d) and was not thinking of Section 14(e), much less of private damage actions.* Neither of the other quotations mentions Section 14(e), and it is apparent from their context that the subject under discussion was the specific "affirmative requirements which would be developed by the Commission" under Sections 13(d) and 14(d).** It is a serious misrepresentation to read these remarks, uttered in support of a grant of authority to write rules requiring specific conduct, as suggesting that something less than fraud would support liability under a section no one was talking about and which the House

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* CCI quotes former Chairman Cohen as saying that the Williams Act would apply to literature put out by management opposing a takeover which, while not "subject to easy establishment as being outright fraudulent . . . may be inadequate." *Senate Hearings* at 178. What CCI omits is that former Chairman Cohen's comments were directed at the need for legislation "to permit the [SEC] to develop some simple rules" that would "permit the Commission to deal effectively" with unfair practices. The rulemaking power the former Chairman was discussing was provided in Section 14(d), and his comments had nothing to do with either Section 14(e), which did not then grant the SEC any rulemaking power, or with damage actions under any section.

** *House Hearings* at 18; *see Senate Hearings* at 210.

and Senate Committees descibed as a "fraudulent transactions" section.

IV. CCI Did Not Prove That It Was Injured by BPC's Alleged Violations

The "causal nexus" between BPC's supposed violations and CCI's supposed injury has two elements, neither of which CCI makes any attempt to analyze. First, CCI would have to establish that a significant number of Piper shareholders would have rejected BPC's exchange offer if they had known of the suspended BAR negotiations. Second, CCI would, in addition, have to establish that it lost its opportunity to gain control of Piper because of BPC's supposed missteps. The question in this case is whether these elements are to be conclusively presumed after contrary findings by the trier of fact. The district court, after trial, found that CCI had failed to establish "a reasonable probability that its defeat and damage were connnected with the claimed violations." (A-145) CCI proposed, and the court of appeals agreed, to rely on speculation and presumption instead.*

A. *The Court of Appeals Improperly Presumed That BPC's Offer Would Not "Have Attracted Any Takers"*

The district court found that CCI had failed to prove that "a single" tendering Piper shareholder would have

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* In contrast to the position CCI takes here, the SEC suggested to this Court in *Blue Chip Stamps* that if the class of private plaintiffs who could sue for damages under Section 10(b) were to be expanded, the "public policy of preventing unwarranted damage awards" would justify requiring a plaintiff to meet high standards of proof of harm. *Brief for the Securities and Exchange Commission as Amicus Curiae, Blue Chip Stamps* v. *Manor Drug Stores, Inc.* at 7. And in its amicus Brief in this case, the SEC does not seek affirmance of the decision below on the causation issues. *See* pp. 64-66, *infra*.

refused BPC's exchange offer and taken CCI's had he known of the BAR negotiations. (A-145) The court of appeals agreed, but held that even if the BPC offer were "superior to that of CCI, taking into account the BAR loss," *Mills* and *Ute* required a conclusive presumption that BPC's offer would not "have attracted any takers." (A-60)

The court of appeals was wrong on this point because, as we showed in our Brief (at pp. 70-76), *Mills* and *Ute* simply did not involve any presumption at all about how the shareholders, the plaintiffs there, would have acted in the absence of the defendants' violations.* CCI quotes at length from *Mills* and *Ute* but cannot reconcile what this Court did there with what the court of appeals did here. CCI then characterizes BPC's argument as an "attempt to distinguish *Mills* and *Ute* on the ground that Piper's stockholders, rather than Chris-Craft, relied" on the BAR omission. (CCI Brief at 84-85) That is shrewd, but false. The very point is that CCI did *not* prove that any tendering Piper shareholders "relied" in the sense that but for the omission they would have rejected BPC's offer; the court of appeals simply presumed, in the face of a contrary trial court finding (A-145), that BPC's offer would have failed entirely. Thus CCI's reliance on *Crane* is misplaced ** and its citation of *Borak*

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* In *Mills* the plaintiff shareholders were injured, in their right to corporate suffrage, by the omission itself. In *Ute*, the scheme cheated the Indian shareholders without regard to whether they relied on any particular misinformation. Indeed, *Mills* says the shareholders were injured by the material omission *whether or not* they would have changed their votes. 386 U.S. at 384 n.6.

** As we pointed out before (BPC Brief at 73 n. **), *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970), would permit a plaintiff who was not deceived himself to recover only if others are "shown" to have been deceived, and only if "this was in fact the cause of plaintiff's claimed injury." *Id.* at 797, *quoting Vine* v. *Beneficial Finance Co.*, 374 F.2d 627, 635 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967). Judge Friendly later added in *Crane Co.* v. *American Standard*,

is beside the point.*

CCI seeks comfort in this Court's recent decision in *TSC Industries, Inc.* v. *Northway, Inc.*, 96 S. Ct. 2126 (1976), but that case clearly illustrates the error of the court of appeals' conclusive presumption that BPC's offer would not "have attracted any takers." *TSC* held that a fact is "material" and should be included in a proxy statement "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *Id.* at 2133. But materiality is not in issue here. The question here is whether a finding of materiality ** creates a conclusive presumption in favor of a third party that the tendering Piper shareholders would not have tendered, and on that point *TSC* says quite plainly that a finding of materiality does *not* imply that the fact in question "would have caused the reasonable investor to change his vote." 96 S. Ct. at 2133.***

Inc., 490 F.2d 332, 344 (2d Cir. 1973), a case CCI does not bother to discuss, that "it is not to be merely assumed" that absent the defendant's violation the plaintiff's plans would have been successful.

* In *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 431 (1964), this Court carefully avoided the causation issue, saying "the causal relationship of the proxy material and the merger are questions of fact to be resolved at trial, not here. We therefore do not discuss this point further."

** Here, of course, the district court found only that a reasonable Piper shareholder "might have hesitated" to exchange (D-15), a finding that falls below the strict *TSC* standard. The court of appeals recited a standard more in keeping with *TSC* (*see* A-35), but it did not purport to be substituting its own assessment of the facts for that of the district court, and, if it had, that would have been wrong under *TSC* itself. 96 S. Ct. at 2133.

*** CCI effectively concedes that BPC was entitled to rebut the court of appeals' presumption of reliance (if such a presumption is proper at all), arguing only that BPC had an opportunity to do so. (CCI Brief at 86) But that argument is transparently insufficient. BPC did not have any warning that the burden might be on it to prove that disclosure of the suspended BAR negotiations would not have made the tendering Piper shareholders reject BPC's offer.

B. *The Court of Appeals Improperly Presumed That BPC's Alleged Missteps Determined the Outcome*

CCI tells this Court that BPC's claimed violations "actually reversed the outcome of a close contest" (CCI Brief at 80), and it was awarded damages by the court of appeals as if this were true. But even with the help of a presumption that BPC's offer would not "have attracted any takers," CCI had proved no such thing. (A-56, 66, 144-45, 150; B-26) And proof, not presumption, is what CCI needed, because whatever *Mills* and *Ute* may say about the need to prove that the tendering Piper shareholders would not have tendered, these cases clearly do not require or permit a presumption that BPC's actions "reversed the outcome" of the whole contest or caused the losses CCI now seeks to recover from BPC.* *See Rondeau* v. *Mosinee Paper Co.*, 422 U.S. 49, 64 (1975).

CCI says that "causation was a matter of mathematics" (CCI Brief at 79), but in fact its causation argu-

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* For example, an extensive recent comment on this case clearly explains the need to distinguish causation of injury from reliance by the tendering Piper shareholders:

> In the complex setting of a tender battle, where the potential pathways of causation are multiple, application of the *Mills* presumption requires care. *It should give rise to nothing more than a presumption of reliance. An injured party, to recover, should be required to prove all other elements necessary to establish but-for causation of its injury.*
>
> *The Second Circuit in Chris-Craft did not require such proof.* Though it spoke of *Mills* as creating only a presumption of reliance, the court in fact presumed but-for causation as to each violation. In so doing, the court set an unfortunate precedent for tort recovery in the tender offer context—a precedent unwarranted by earlier securities case law, unjustified under established tort principles of causation, and potentially inhibitory upon take-over bids, contrary to the express intent of Congress in promulgating the Williams Act. Note, *Chris-Craft: The Uncertain Evolution of Section 14(e)*, 76 Colum. L. Rev. 623, 658 (1976) (footnotes omitted, emphasis added).

See also SEC Brief at 147-48.

ment rests entirely on speculation and conjecture, belied by the record and the findings:

—First, as we noted above, CCI speculates that all the Piper shareholders who tendered to BPC would have refused to tender had the suspended BAR negotiations been discussed in the prospectus. (*E.g.*, CCI Brief at 82) The district court found against CCI on the causation issue, and held in the SEC case only that disclosure "might" have caused an investor to "hesitate." Yet the price of BPC's stock went up when the BAR sale was later agreed to and announced (App. 591A), and no tendering Piper shareholder either sued BPC or accepted BPC's rescission offer.

—Second, CCI speculates that if all of the tendering Piper shareholders had rejected BPC's tender offer, many would have accepted the less generous CCI offer. At one point, CCI tells this Court that it "*would* have obtained *some*, if not most, of the Piper shares tendered to" BPC (Brief at 23 n. **, emphasis added); later it says that it "*might* have attracted *many* of" those same shares. (*Id.* at 87, emphasis added) Neither statement is supported by evidence or accompanied by a citation to the record. This is understandable, for CCI is trying to ignore the district court's explicit finding with regard to the BAR matter that:

> There is no proof that a single exchanging Piper shareholder would have refrained from the exchange *and* taken an offer for his shares from Chris-Craft instead of that from Bangor Punta. (A-145)

CCI's similar speculation with respect to the shares BPC acquired for cash in May (CCI Brief at 81) runs afoul of another explicit finding of the district court: ". . . there is no basis for concluding that, absent Bangor Punta's acquisition of these blocks, Chris-Craft would have achieved its goal of control." (A-150)

—Third, CCI speculates that if it had led 41%-31% at the end of the competing exchange offers, it could not have been overtaken. (CCI Brief at 79) For this proposition, CCI misquotes a BPC witness and trots out testimony of its own witness that was expressly rejected by the district court. What BPC's expert really said was that a 41%-31% lead would be "formidable but not insurmountable" (App. 2877A), *if* CCI had "the cash resources and the determination, apparent determination, to pay whatever price is necessary . . . ." (App. 2876A) But those are just what CCI lacked: CCI had virtually exhausted its cash and borrowing capacity by February (A-113-15), and it voluntarily "withdrew from the struggle" (A-18) before BPC obtained a majority. And the testimony of CCI's own witness as to a "99-1 certainty" was expressly rejected by the district court because it lacked "common sense." (B-64, n. 18) Both the lower courts agreed that CCI had not shown that it could have won absent BPC's missteps. (A-56, 145, 150)

—Fourth, CCI speculates that BPC's 4% lead (45%-41%) after the competing exchange offers could not be overcome. (CCI Brief at 22) This speculation has no more support than the speculation that CCI could not have been overtaken with a hypothetical 41%-31% lead. But on this point there is no room at all for CCI's arguments because there are judicial findings, made on precisely the critical day, that the contest was still open.*

The fact is that the control contest was won by the higher bidder, as it should have been. The district court

* Judge Tenney on August 19, 1969 denied CCI's request for a preliminary injunction, holding that "[n]either party has gained control of Piper, and both are still in a position to do so." (C-47) The Second Circuit affirmed, saying that CCI did not even contend "that prior misdeeds of Bangor Punta so determined the course of the competition for shares . . . that Chris-Craft was placed at any real disadvantage." (C-9) Yet CCI "withdrew from the struggle" (A-18) on August 19, 1969 when it failed to get its injunction.

found, and the court of appeals agreed, that BPC's exchange offer was worth more than CCI's while they overlapped. (A-140 n.10; A-42-43 & n.19) CCI " 'shot its bolt' in the financial sense by early February 1969," and "although additional Piper shares were available in the market after the expiration date of CCI's [cash] tender offer, some at less than $65 per share, CCI purchased only 9,100 shares" in over two months.* (A-114-115, footnote omitted) After the exchange offers, with the control contest open to either bidder (C-9, 47), BPC spent $7 million in cash, while CCI spent only $2 million and then withdrew.** The trier of fact, an experienced district judge, saw right through CCI's causation arguments; it was the court of appeals, reviewing the cold transcript, that reversed the verdict of the marketplace.

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* CCI claims it had not run out of funds (CCI Brief at 88 and n. *), but its citations do not support it. First, CCI cites Judge Timbers' opinion for the proposition that it had arranged to borrow up to $22 million in February 1969, but neglects to add that, as Judge Mansfield pointed out, "the record shows conclusively that CCI's chances of obtaining such a loan were negligible, due to a restrictive agreement in effect with its senior noteholders and the prohibitive cost of borrowing additional funds." (A-113) The cost was "a staggering 43.11%!" (A-114) CCI, of course, never did obtain the loan. Then CCI refers to its cash on hand from April through August, but neglects to add that it could find $10 million only by using all the cash it had after essential working capital (App. 3085A-87A), and that it would have needed the consent of its senior creditors to spend more than $3 million. (App. 3111A) Finally, CCI says that its bank "obviously" would have made funds available to it. But its banker said that his bank had reached the legal limit on loans to CCI by August, and therefore could not provide CCI another penny. (App. 3110A)

** At the conclusion of the competing exchange offers BPC had committed approximately $59.5 million, CCI $42.6 million. (A-18) Thus CCI, if it had the resources, had $16.9 million to go just to make an effort equal to that of BPC. If it had the money in August 1969, and if it had been willing to make an equal effort, CCI could have offered $126 for each of the 134,611 Piper shares it needed to gain control, far more than the $80 BPC went into the market and paid.

CCI's reliance on *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), simply backfires. The factual differences are alone dispositive. In *Bigelow* the plaintiff showed both that he made less money after the unlawful conspiracy took hold than before and that a demonstrably inferior competitor who was part of the illegal antitrust conspiracy made more money than the plaintiff did during the relevant period. Here, by contrast, CCI has not shown that either of BPC's missteps made a difference in the outcome of the contest. But there is even a more fundamental point. In *Bigelow*, the court of appeals, in holding that injury had not been proved, had substituted its judgment for that of the trier of fact. This Court reversed, holding that the evidence sustained the verdict. There is not a hint in the opinion that a trial court verdict for the defendant ought to be reversed—as was done here—on the basis of appellate presumptions of injury used to overcome contrary findings of fact, and not once in the history of the *Bigelow* doctrine in this Court has that case been used for that purpose.* *Bigelow* teaches that appellate courts ought not to substitute their own views for those of the trier of fact save in unusual circumstances. Application of that rule to this case requires the reinstatement of the district judge's finding that BPC did not cause any injury to CCI.

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* *See, e.g., Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). Another illustrative case is *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 125-29 (1969). There an appellate court was held to have properly set aside a verdict for the plaintiff since the record showed that factors other than the defendant's anti-trust violation had foreclosed plaintiff from the market anyway.

The stirring language CCI quotes from *Eagle* v. *Horvath*, 241 F. Supp. 341 (S.D.N.Y. 1965) (CCI Brief at 81), has nothing to do with this case. *Eagle* involved a motion for summary judgment by defendants who claimed that since they could have accomplished the challenged merger by redeeming certain preferred stock instead of soliciting proxies, causation was not shown. The defendant's motion was denied. Here there was a full trial, and the district court found that CCI had failed to prove that BPC's missteps caused any injury to CCI.

V. The Court of Appeals' Damage Formula Vastly Overcompensates CCI

The courts below agreed that "CCI had not demonstrated that it would have obtained a controlling position in Piper absent defendants' violations." (B-26) All that the court of appeals thought CCI lost was its *opportunity* to gain control of Piper. The district court "generously valued" this opportunity, after a trial, at $1.6 million. The court of appeals raised the damage award to $25.8 million, plus interest, on the erroneous theory that BPC had to insure CCI against market losses unrelated to anything BPC did and due primarily to the fact that for extraneous reasons Piper's near-term prospects turned out to be less rosy than both tender offerors thought.*

CCI tries to justify this extraordinary result by asserting that its injury had two elements: "the lost opportunity to compete for control" and "the wrongful conversion" of CCI's Piper stock into "an illiquid 42% minority." (CCI Brief at 91) This double counting is unsupported in law or fact. If CCI had won the control contest it would have just one thing that it now does not have: Piper shares that it might (or might not) be able to sell as a block for a premium over the price that any other Piper shareholder could get for his shares.** Control would not have insured it (as the judgment below does) against the decline that occurred in the market value of all Piper shares. Taking into account the fact that BPC would have been (as CCI now is) a large minority shareholder able to elect several directors, and that there are numerous restrictions on the ability of a ma-

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* The SEC does not seek affirmance of the decision below on the damages issues. *See* pp. 65-66, *infra*.

** *See* B-69. CCI brought out on cross-examination of BPC's expert that in a public offering the control premium would be dissipated, and that the larger number of shares involved would actually make the public offering of a control block more difficult than that of a minority block. (App. 2833A-34A)

jority holder to run a company for its own benefit or to sell "control" for more than other shareholders can get, the district court found that the control premium here would be no more than 10% of the fair market value of Piper shares. (B-69) Assuming *arguendo* that CCI actually did lose its chance to get that 10% premium, its recovery cannot exceed the value of its goal. *See* authorities cited in BPC Brief at 82; *see also Brief for the United States as Amicus Curiae on Petitions for Certiorari* at 22.

CCI's unsupported claim that its Piper shares were "transformed" into an "albatross" (CCI Brief at 23) "of virtually no value" (*id.* at 98) is on its face an absurd exaggeration.* At the end of the contest, CCI's Piper shares were worth per share, in a public offering, just what BPC's Piper shares were worth (App. 2833A), and in a private offering, according to the findings of fact, no more than 10% less. The district court found on November 6, 1974 (B-73), and CCI's subsequent reports to the SEC on Form 4 confirm, that since 1969 and continuing into 1976 CCI has steadily bought Piper shares, adding some $300,000 to the weight of its "albatross." On May 28, 1976 Piper paid a cash dividend of $1.10 per share, worth nearly $800,000 to CCI. *See* Report on Form

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* Judge Pollack found: "There has been no showing that CC has been 'locked-in' so that the sale of its Piper stock has been impossible." (B-76) This finding was affirmed by the court of appeals. (B-35)

CCI's assertion that its interest in Piper "was not even regarded as good collateral by its bankers" (CCI Brief at 98) is just wrong. CCI's citation (App. 3120A-21A) shows its banker was not talking about the collateral value of its minority holding at all; he simply said that in August 1969, with BPC holding a 45%-41% lead, he would have wanted to know "will the additional loan in fact give Chris-Craft control?" before loaning CCI the money to buy more Piper stock in connection with its quest for control. Even this was speculation, since he had just testified that his bank had reached its legal limit on loans to CCI. (App. 3110A)

10Q for the Quarter Ending June 30, 1976, filed by Piper with the SEC.

CCI is misleading at best when it claims that it (or someone stepping into CCI's shoes) would be at BPC's "mercy with respect to management and policy decisions" at Piper. (CCI Brief at 24 n.**) Through 1979, the Piper Board is frozen at eight, and CCI can elect four of the directors. (B-50 n.6, 86) Even after that date, because of cumulative voting, CCI is guaranteed half of the directors if there are an even number, and one short of half otherwise.* Cooperation by "majority" and "minority" stockholders in this situation is a practical necessity, and CCI participates fully in the management and financial future of Piper. Nor does CCI's charge that BPC could compel a merger at any time and buy CCI's interest "for a song" (CCI Brief at 98) have any substance. This precise contention was found by the district court, even apart from the legal obstacles, to be highly questionable as a "matter of practical finance." ** State law appraisal proceedings

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* CCI's response that BPC might eventually be able to change the articles of incorporation to eliminate cumulative voting overlooks the fact that such a change would, under Pennsylvania law, give CCI the right to demand an appraisal and to force BPC to pay cash for CCI's Piper shares. Pa. Stat. Ann. tit. 15, § 1810 (Supp. 1976).

** B-51 n.7. Judge Pollack continued:

> At the bottom of a business cycle and in a period of contraction, BP (and thus Piper) would clearly have limited resources or at least limited economic incentives to fund an appraisal award; CC's huge minority block, by any standard, would sport a heavy price tag to be borne by BP in such a proceeding. Moreover, as markets rise, the cash cost of satisfying an appraisal demand might well increase greatly without a corresponding increase in available cash to fund the payout, thus chilling any prospect of merger in such circumstances. *Id.*

In Pennsylvania (the relevant jurisdiction) statutory appraisals are based on long-term performance to minimize the impact of the business cycle. *See* Note, *Corporations—Fair Value for Dissenting Shareholders Under the Pennsylvania Appraisal Statute,* 78 Dick. L. Rev. 582, 595 (1974).

(and the requirement that the dissenter be paid "the fair value of his shares" in cash, Pa. Stat. Ann. tit. 15, § 1515 (Supp. 1976)) provide complete protection, especially for a holder of a large minority block, who is able and willing to litigate.*

The cases CCI cites (Brief at 92-93) to support its double counting theory of damages do not help CCI any more than the *Chasins* and *Esplin* cases, on which the court of appeals relied.** As we demonstrated in our Brief (at 89-91), *Chasins, Esplin*, and similar cases are inapposite because, if they were in fact correctly decided, they turn on the defendant's inducing the plaintiff to act at all. CCI tries to bring itself under those cases by asserting that it was induced, since it thought BPC would comply with the law. (CCI Brief at 95) That is nonsense. CCI entered the contest long before BPC and acquired most of its "albatross" before BPC entered; and after BPC did enter, it obviously did not "induce" CCI—in any meaningful sense of that word—to continue. If CCI pre-

* CCI tries mightily to suggest (Brief at 23-24) that its appraisal right in the event of a merger would be worthless, but CCI simply ignores the district court's acceptance of testimony that the per share appraisal value was $49.46 (B-56) and its finding, precisely in point, that the fair market value was $48 per share on the relevant date. (B-57)

** *Harris* v. *American Investment Co.*, 523 F.2d 220 (8th Cir. 1975), *cert. denied*, 96 S.Ct. 784 (1976); *Foster* v. *Financial Technology Inc.*, 517 F.2d 1068 (9th Cir. 1975); and *Myzel* v. *Field*, 386 F.2d 718 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968), are all cases in which the plaintiff was fraudulently induced to buy or sell. And *United States* v. *Swift & Co.*, 270 U.S. 124 (1926); *Schwartz* v. *NMS Indus., Inc.*, 517 F.2d 925 (5th Cir. 1975), *cert. denied*, 96 S.Ct. 785 (1976); and *In re Kellett Aircraft Corp.*, 186 F.2d 197 (3d Cir. 1950), are all breach of contract cases dealing with mitigation of damages. In *Swift & Co.*, for example, in sharp contrast to this case, there was no market price for the salty bacon, and the defendant was principally responsible for reducing the price that the plaintiff could get as he tried to sell and mitigate damages. 270 U.S. at 147-49.

vails on its inducement theory, every securities plaintiff would make the same argument, and every securities defendant would be turned into an insurer of the plaintiff's investment. CCI's theory cannot be squared with Section 28(a) of the 1934 Act or such cases as *Feit* v. *Leasco Data Processing Equipment Corp.*, 332 F. Supp. 544, 586 (E.D.N.Y. 1971). (*See* BPC Brief at 82-91)*

CCI's effort to retain the insurance proceeds awarded by the court of appeals extends to a staggering misuse of the Solicitor General's Brief for the United States on Certiorari. CCI asserts that the Solicitor General "calculated identical damages by an alternative formula" (CCI Brief at 97), neglecting to note that the formula was clearly identified as pure speculation based on data that could not be found in the record. *Brief for the United States as Amicus Curiae on Petition for Certiorari* at 23-24. In fact, the Brief for the United States reached for an alternative formula because it could not justify forcing BPC to compensate CCI

> for a loss caused by a post-injury decline in the market value of Piper stock of approximately $15 per share—a loss that Chris-Craft would have sustained even if petitioners had not violated the securities laws and, indeed, even if Chris-Craft itself had succeeeded in the contest for control. *Id.* at 23 n.14.**

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* CCI's failure to mention Section 28(a), which limits damages under the 1934 Act to "actual damages on account of the act complained of," means that it has not even responded to one of the basic legal issues on which this Court granted certiorari, the construction of Section 28(a). *See* BPC's Petition at 27-28; First Boston's Petition at 11.

** The Solicitor General has expressly advised the Court that the Brief of the United States "took the position that the court of appeals had followed an incorrect approach in measuring damages." *See* his notation in the SEC Brief at 198.

The court of appeals' decision in *Chris-Craft III* simply cannot be justified.* It gave CCI vastly more than it would have had if it had won control of Piper. If BPC is held to have interfered with CCI's opportunity to gain control, the proper damage award is one based on the value of that opportunity—the award made by the district judge.**

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* CCI tries to salvage the court of appeals' excessive judgment by a supposed verification based on a hypothetical private sale on September 5, 1969. (CCI Brief at 92, 97) But that afterthought starts from the same erroneous assumption that CCI was entitled to be bailed out of its business decision to buy Piper stock. The "vertification" itself is full of mistakes. *See* B-31-32 n.24. The court cf appeals first added a 5% control premium to CCI's *cost*, which presumably already included what CCI thought its opportunity was worth; and, in any event, the court of appeals had just held that legally it had to ignore any premium in order to justify not remanding for a determination of damages. (B-25-26) The court of appeals then computed the private sale price by taking 25% from $43.50, the net amount CCI would have received in a public offering on September 5. The witness on whom the court of appeals relied had clearly referred to a 25% discount from the public offering price, which he had estimated as $46, not from the net to CCI after expenses. (App. 2831A) The correction of these plain errors would have reduced the "alternative" calculation of damages, at best $1.7 million below the award, by another $3.5 million. And even then the alternative would have been valid only if CCI had been certain to win control of Piper absent the violations and if it was entitled to be bailed out of its own misjudgment of Piper's value.

** The *Chris-Craft III* decision has been harshly criticized in recent law review commentary. *See* Note, *Chris-Craft: The Uncertain Evolution of Section 14(e)*, 76 Colum. L. Rev. 634, 635 (1976) (the "interpretation of Section 14(e) in these two areas [causation and damages] cannot be justified"); Case Note, 89 Harv. L. Rev. 1239, 1247 (1976) (criticizing "the double counting inherent in [the] award of final blockage"); Note, *Survey of 1974 Securities Law Developments*, 32 Wash. & Lee L. Rev. 719, 789 (1975) (award in *Chris-Craft III* is "frighteningly punitive").

ADDENDUM: THE SEC BRIEF

The SEC urges the Court to create private damage remedies for a plaintiff that neither bought nor sold under Rule 10b-6, and for a tender offeror under Section 14(e). (SEC Brief at 194) The SEC does not urge affirmance on the scienter, causation, or damages issues (SEC Brief at 194) and in fact makes concessions that should require reversal on these points. *See* pp. 64-66, *infra*.

For all its general learning, the SEC Brief adds neither analysis nor relevant authority on any of the issues actually before the Court.* More eloquent is what the SEC does not say, and the lack of relevant authority it found for the positions it takes.

1. *Rule 10b-6*

The SEC fails to acknowledge that it never warned BPC (as it warned CCI) against cash purchases of Piper shares, that it never accused BPC of violating Rule 10b-6, and that it never required BPC to report any such violation in its disclosure materials. Even though the point has been challenged in this Court, the SEC has provided no support for the assertion in its May 5, 1969 Release that proposed Rule 10b-13 codified "existing interpretations of Rule 10b-6." **

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* Many of the "authorities" the SEC cites are quotations from unidentified contributors to legislative compilations, often so truncated and shorn of context that it is impossible to tell what the contributor was actually talking about, even if any Congressman read his submission. *See, e.g.*, SEC Brief at 69-74. Some apparently important quotations, such as the acknowledgment that Section 14 (e) is "in the tradition of the general fraud provisions" (SEC Brief at 64), are unaccompanied by citations.

** To support this claim, the SEC cites only a 1959 law review article whose one arguably relevant paragraph does not even deal directly with the issue at hand. *See* Foshay, *Market Activities of Participants in Securities Distributions*, 45 Va. L. Rev. 907, 931-32

The SEC does, however, provide an interpretation of Rule 10b-6 that expressly supports BPC's understanding of the purpose of the Rule:

> The rationale [of the rule] is that a potential purchaser of the securities *being distributed* should not be induced into buying them because of abnormal market pressures driving the price up through secret purchases by the issuer or [its] underwriters. (SEC Brief at 180, *quoting* Binder, *The Securities Law of Contested Tender Offers,* 18 N.Y.L.F. 569, 666 (1973)) (emphasis added)

In other words, the SEC acknowledges that, in terms of the facts of this case, Rule 10b-6 was intended to protect the potential purchasers (*i.e.*, the Piper shareholders) of the BPC securities that were in distribution from being misled into tendering by artificial market activity increasing the price of BPC securities. But here there are express findings, affirmed on appeal and not challenged by the SEC, that there was full disclosure, no intent to mislead, "not a scintilla of evidence" that anyone was actually misled, and no effect on the market for any security. (A-150-51)

The SEC is therefore reduced to arguing (SEC Brief at 187-89) that it has the power to adopt a *per se* rule of manipulation under Section 10(b) and thus create a cause of action for a plaintiff who (a) was admittedly not the intended beneficiary of the rule, (b) neither pur-

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(1959). The SEC cites *nothing* from its own rulings or statements. It also ignores the opinions of Judge Tenney and Chief Judge Lumbard in this case, and Judge Weinfeld's opinion of February 7, 1969 (pre-dating the May 1969 release) in *Armour & Co.* v. *General Host Corp.*, 296 F. Supp. 470, 476 & n.18 (S.D.N.Y.):

> [S]ubstantial legal issues exist whether Rule 10b-6 is applicable at all to the instant transactions. The principal question is whether subsection (b) of the Rule applies to the stock of the "target" corporation as well as that of the distributor.

chased nor sold either the security that was supposedly manipulated "*per se*" or any other security "in connection with" which the violation occurred, and (c) was not injured by the violation, except in the Pickwickian sense in which the low bidder at an auction is injured because the high bidder ran a red light at an empty intersection to get there in time. But the argument falls apart at every step. Even if the SEC has authority to issue *per se* rules dispensing with scienter under an antifraud section (and thus circumventing *Hochfelder*), it did not do so here. The SEC cannot adopt a *per se* rule merely by declaring in a release that a *proposed* rule "codifies existing interpretations" that turn out not to exist. And when (if ever) the SEC does succeed in creating a *per se* rule, that merely makes the fact of violation automatic: express findings (as here) that the defendants' actions had neither the prohibited purpose nor the prohibited effect obviously preclude a claim that a violation caused actual injury.

The SEC Brief is eloquently silent about CCI's suggestion in this Court that BPC's purchases of Piper stock after it announced its intention to make an exchange offer might have violated Section 14(e). Instead, the SEC suggests, with a note of some despair, yet another new theory: CCI might be granted standing under Section 9(e) of the 1934 Act. Were less at stake, it would be amusing that this new violation is suggested for the first time on page 191 of an amicus brief filed in this Court more than seven years after the events.

The new Section 9 theory is inapposite on three different grounds. First, the SEC says that Rule 10b-6 was adopted partly under the authority of Section 9(a)(6), but that wholly undermines the SEC's contention that Rule 10b-6 is a *per se* rule for whose violation no intent is required. Section 9(a)(6) applies only to transactions effected for the "purpose" of causing a prohibited manipulation; there is a finding of no such purpose here.

Second, Section 9(e) creates express, not implied, damage liability for violations of Section 9, but it creates liability only against a person who "willfully" violates Section 9, and there certainly is no finding of "willfulness" in this case. Third, and most telling of all, a violator of Section 9 is liable only to "any person who shall purchase or sell any security at a price which was affected by such action or transaction," and CCI's action would fail because it has never alleged (and cannot allege) that there was any effect on the price of any security bought or sold by CCI or any other security. In sum, the existence of Section 9, with its express liability provision and its acknowledged relationship to Rule 10b-6, argues strongly against, not for, CCI's case here.*

2. *Section 14(e)*

The SEC's essay on tender offers adds not an ounce of relevant authority on the question whether Congress intended that a tender offeror can sue for damages under Section 14(e) against anyone, particularly against another tender offeror whose securities are held by the former target company shareholders. Most of the essay is devoted to much broader questions that do not need to be decided here.

First, despite all of the SEC's assertions about what can be deduced from the legislative history, there is not a single sentence uttered by (a) any member of Congress, (b) any member of the Executive Branch, or (c) any representative of the SEC, suggesting that anyone

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* The SEC also suggests (Brief at 185-86) that the Court emasculate *Blue Chip Stamps* by declaring that any purchase of a "relevant" security will suffice even if there was no purchase or sale of any shares "in connection with" which the violation occurred. Under the SEC's theory, the owner of a security could sue under Rule 10b-5 for being misled into failing to sell, alleging merely that he was once a purchaser. *But see Blue Chip Stamps,* 421 U.S. at 737-38.

at all would have a private action for damages under Section 14(e) or any other provision of the Williams Act. There is not a single mention of *Borak* or *Kardon* by any such person. If the SEC thought Congress should authorize private damage actions under Section 14(e) as a supplement to its enforcement powers, it not only failed to include such a provision in the legislation of which it was the chief draftsman, but it (and its representatives) failed to mention the point in any official or unofficial report, memorandum, testimony, speech, magazine article, or anything else, and no member of Congress ever gave the slightest sign that the SEC got the point across.*

The best the SEC can do is to quote from the written submission of Professor Israels—who never testified and whose submission is never mentioned by any committee or member of Congress—that he "assume[d]" that the SEC would be able to enforce the various provisions of the Williams Act

> by proceedings for injunction in the Federal courts; and that under *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), a private litigant could seek *similar* relief before or after the significant fact such as the acceptance of *his* tender of securities. (SEC Brief at 54, quoting from Senate Hearings at 67) (emphasis added)

This isolated written submission of a private witness, even one accepted by the SEC as a "prominent com-

* In the absence of *any* relevant contemporaneous statement by the SEC during the congressional consideration of Section 14(e), we are grateful for CCI's quotation from *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969), for reminding us of what this Court said on the following page: "if those administrators who participated in drafting the . . . act understood [it to mean what the agency contended it meant], they obviously failed to communicate their understanding to the drafters of the committee report." *Id.* at 193.

mentator" (SEC Brief at 54), gives CCI no help.* First, it is not directed, at least not specifically, to Section 14 (e). Second, it is apparent that Professor Israels, in his "such as" clause, spoke only of target shareholders as plaintiffs. Third, it is apparent that he spoke only of their obtaining relief "similar" to that obtainable by the SEC "by proceedings for injunction." Even if any congressman read these three lines from the extensive hearings record—and there is no indication that anyone did—he would not have gotten the message that the SEC is now trying to broadcast.**

Even more to the point, the SEC and the parties have found not a single sentence uttered by (a) any member of Congress, (b) any member of the Executive Branch, or (c) any representative of the SEC, suggesting an intention to give tender offerors any new rights or remedies or to protect them from anything except excessive regulation. There is, of course, evidence that Congress wanted target shareholders to be protected against misstatements either by tender offerors or by their own management, but there is not a word from any government official

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* Even if the submission were in point, it is hornbook law that the statements of private witnesses at legislative hearings are not evidence of congressional intent unless there is some reason to think Congress was influenced by them. *See Hochfelder*, 96 S.Ct. at 1386 n.24; 2A Sutherland, *Statutes and Statutory Construction* § 48.10 at 210 (4th ed. C. Sands 1973) ("Generally statements made by others [than members or draftsmen] at the committee hearings as to the nature and effect of a bill are not accorded any weight.") (footnote omitted); G. Folsom, *Legislative History* 37 (1972) ("committee hearings are of limited utility" and written presentations are "less persuasive" than oral ones).

** The other witness the SEC relies on, Professor Painter, referred to *Borak* only in his written statement as well, and did so, like Professor Israels, in the context of "private remedies [for] injured investors." *Senate Hearings* at 140. Professor Painter did testify, but did not mention and was not asked about private remedies. *Id.* at 122-23. Neither CCI, nor the SEC, nor we have found any other reference in the legislative history to *Borak* or implied private remedies.

suggesting any concern for tender offerors other than making sure that the burdens of making disclosure to investors were not unequal.

Indeed, the words the SEC omits from the most nearly relevant paragraph in the legislative history are decisive here. The SEC quotes former Chairman Cohen as saying that the legislation would "serve to help the takeover bidder." (SEC Brief at 74) Mr. Cohen was discussing the duty of full disclosure by management to its shareholders, and the full sentence that the SEC garbles reads as follows: "In fact, the bill if passed might serve to help the takeover bidder in certain situations, because it would permit *the Commission* to deal effectively with certain practices which may be unfair and which may be engaged in by what may be called an entrenched management." *Senate Hearings* at 178 (emphasis added). Mr. Cohen went on immediately to say:

> "But the principal point is that we are not concerned with assisting or hurting either side. We are concerned with the investor who today is just a pawn in a form of industrial warfare. And that is all the argument here today is: Do you help one side, or do you help the other side? The investor is lost somewhere in the shuffle. This is our concern and our only concern." *Id.*

Consistently with this view, nothing in the Williams Act gives offerors any affirmative rights of any kind. There is not a word in the legislation or its history to support the SEC's assertion that the Act creates "a clearly articulated federal right in the plaintiff," to satisfy the first test of *Cort, see* 422 U.S. at 82 (SEC Brief at 9), or "has granted a class of persons [including plaintiff] certain rights," to satisfy the second test of *Cort. See* 422 U.S. at 82 (SEC Brief at 11). To the contrary, there is no evidence that anyone thought tender offerors needed either new protection or new remedies.

Third, in all of the discussion of the supposed parallel between Section 14(a) and Section 14(e), the SEC cites not a single case for the proposition that competitors can sue in that capacity for damages under either section, except the *Union Pacific* case, discussed above at 13-14, and *Nicholson File*, discussed above at 20-21. As noted above, the first case is a second alternative holding by a district court in an injunction action, and the second is a pre-*Rondeau* case which, although refusing to dismiss the offeror's complaint before trial, stated that damages should not be awarded against the target company if that would defeat the Act's purpose of protecting the target company's shareholders.*

Lacking cases in point, the SEC cites cases permitting a target company to seek an injunction to protect its shareholders as authority for the position that management can sue on its own behalf for damages. Surely the SEC recognizes the difference between lawsuits brought on behalf of a corporation for injunctive relief to protect its shareholders and lawsuits brought by management for damages to protect its personal interests, particularly in the context of a proxy fight or tender offer. The SEC also wrongly asserts that *Borak* obliterates the distinction between suits for injunctive relief and suits for damages. *Borak* simply holds that the protected class, the stockholders of the target corporation (on their own behalf or derivatively), can in an appropriate case not only obtain an injunction, but also recover damages from the directors of their own company for violation of a fed-

* Incidentally, although it is not essential to any issue before the Court, the SEC significantly overstates the parallel between Section 14(a) and Section 14(e). Section 14(a), the proxy section, is the basic provision requiring periodic disclosure by management to its shareholders, and it deliberately gives the SEC the broadest possible charter to write rules "in the public interest or for the protection of investors." It is true that power in a corporation can shift by vote or by purchase, but Section 14(e) does not parallel Section 14(a) either in its scope or in its language.

eral statutory duty plainly owed to stockholders. *Borak* did not consider whether permitting a person outside the "especial class" to secure an injunction that protects the interests of the class means that the person outside the class can also obtain damages for injuries to himself rather than to the class, because *Borak* involved only plaintiffs within the especial class. When the Court did consider this question, it ruled that while "100 injunctions are no more effective than one," *Hawaii* v. *Standard Oil Co.*, 405 U.S. at 261, damage awards raise different problems, and that Congress had drawn the class that can sue for damages more narrowly than the class that can sue for injunctions.*

The SEC has offered neither legislative history nor precedent nor reasoning to support its naked assertion that tender offerors are within the "especial class" Congress intended to protect. The SEC quotes *Cort's* declaration that the plaintiff may fall within the "especial class" where there is "a pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard," 422 U.S. at 82 (quoted, SEC Brief at 8), and then argues that Sections 14(a) and 14(e) are both "pervasive schemes." (SEC Brief at 52-68) But Section 14(a) pervasively regulates the relationship between shareholders and other persons who are seeking their proxies. It has never been held to regulate, pervasively or otherwise, any "relationship" between two outsiders who both happen to be seeking mergers with the target company. Similarly, the Williams Act is a statute requiring all tender offerors to make full and fair disclosure "to those with whom they deal," S. Rep. No. 550, *supra*, at 11, "for the benefit of stockhold-

* Section 27 of the 1934 Act, much cited by the SEC, simply provides jurisdiction over causes of action that can properly be found to have been intended by Congress. To illustrate the point, the existence of Section 27 did not create a cause of action for the plaintiff in *Blue Chip Stamps*.

ers." 113 Cong. Rec. 855 (1967) (Senator Williams). There is no evidence that any member of Congress (or the SEC) thought of it as "a pervasive legislative scheme governing the relationship between" plaintiff tender offerors and defendant tender offerors.

The SEC's Brief, for all its discursiveness, singularly lacks a discussion of the serious policy issues (*see* pp. 22-27, *supra*) that Congress would have had to face if it had expressly addressed the problem of whether "all participants" in a tender offer contest should be allowed to sue one another for damages under Section 14(e). For the most part, the SEC, in Professor Hart's phrase, has "avoided shedding light on the problem by ignoring it." Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 511 n.72 (1954). The SEC does take up the federalism issue long enough to bemoan that State laws do not always correspond with what the SEC regards as a proper governmental response to tender offers (SEC Brief at 14), and that State remedies for tortious interference may not cover every case where one tender offeror, pursuing its own objectives, interferes with another. (SEC Brief at 44-46) This argument betrays disrespect for both the federal system and the relationship between Congress and the courts. What the SEC calls a "crazy quilt" (Brief at 126) is, as there illustrated, a broad State response to a problem, many aspects of which fall clearly within traditional areas of State concern. *See Cort*, 422 U.S. at 78. Certainly this Court should not imply a damage remedy for all participants in a control contest that would be "an intrusion of federal law into the internal affairs of corporations" (SEC Brief at 123), and that would displace State laws on tortious interference with business opportunities, in the absence of clear evidence that Congress intended to do just that.

3. *Other Issues*

As noted, the SEC does not seek affirmance of the decision below on the scienter, causation, or damages issues, but the SEC does toss in a few observations on the legal principles involved.

As to scienter, the SEC adds no relevant authority not cited in CCI's Brief and discussed above, and it adds no analysis at all.* The repeated acknowledgment that Section 14(e) is an antifraud provision patterned after Rule 10b-5 (SEC Brief at 17; 64-65 & n.159; 155 n. 364) does, however, support the conclusion of every court that has considered the issue that the Rule 10b-5 scienter requirement should apply.

As to causation and damages, the SEC acknowledges a distinction between "(i) causation for purposes of determining the existence of a cause of action—that is, liability—and (ii) damages causation." (SEC Brief at 145) Whatever the first of these may mean, the SEC is quite clear that the second must be proved by evidence:

> The presumption of causation from materiality, consequently, does not automatically entitle a private plaintiff to monetary damages—a causal connection between the material misstatement or omission on the one hand, and the consequences complained of on the other, must be demonstrated. Thus . . . the plaintiff here should

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* The SEC does bring new meaning to the phrase "material omission" by quoting fragments from *Hochfelder* (Brief at 17) for the proposition that Section 14(e) reaches unintentional wrongdoing because Rule 10b-5 "after which it was patterned," reaches misleading conduct whether "intentional or not." *Hochfelder,* of course, holds exactly the opposite as to Rule 10b-5. But since the SEC was the principal draftsman of Section 14(e), this concession as to the ancestry of the provision is fatal to CCI's case on the scienter issue. *See also* Brief for the SEC as Amicus Curiae, *Iroquois Industries* v. *Syracuse China Corp.,* 23, 25 (Feb. 1969) (cited, CCI Brief at 48): Section 14(e) "is an antifraud provision similar to section 10(b) and rule 10b-5."

> be allowed to recover only those damages shown to have been caused by the violative conduct. *Id.* at 147-48

As to this very case, the SEC concedes:

> if the defendants can demonstrate that all or part of the plaintiff's damages were the result of factors other than the defendant's wrongdoing, the award of damages should be diminished accordingly. (SEC Brief at 161 n. 370)

These propositions alone would require reversal here, for the court of appeals first presumed causation and then determined, without either requiring the plaintiff or permitting the defendants to demonstrate anything, that CCI should be indemnified for a market decline that was plainly not caused by BPC.

The SEC also states that in the absence of scienter, damages against BPC should be limited "by analogy [to] the limitations on recovery in Section 12(2) of the Securities Act." (SEC Brief at 155-56) This, of course, would preclude recovery here.* In any event, the SEC adds, under Section 28(a) of the 1934 Act, damages must be limited to "actual damages on account of the act complained of," (SEC Brief at 48), and this limits damages to compensation for the "decline in value of [CCI's] Piper holdings, to the extent shown and to the extent caused by the wrongful act of the defendant . . . ." (SEC Brief at 133) The SEC then says daintily that, of course,

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* Section 12(2) permits recovery only by purchasers and only of the consideration paid by the purchaser to the defendant. CCI could recover nothing from BPC under this theory. Section 11(g), which applies to both the underwriter (First Boston) and the issuer (BPC), limits the liability of *all* defendants to "the price at which the security was offered to the public," which is far below the damages awarded here. We assume that the SEC's failure to mention BPC and its two directors in connection with the Section 11(g) limitation, which is fully applicable to them, was a "mere negligent omission." (*Cf.* A-148)

"the precise method of computing damages in accordance with the general principle" is not its concern. (*Id.* at 171 n.371) The SEC's principle at least avoids CCI's double counting, but the SEC simply ignores the Brief for the United States on Certiorari, which its attorneys signed. That Brief acknowledged that "the precise method" used by the court of appeals wrongly compensated CCI for $15 per share ($15 million in the aggregate) of unrelated market decline and, in addition, risked "substantial overcompensation of the defeated contestant" by failing to make any discount for the fact that what CCI lost was, at most, an "opportunity" of very uncertain value. (*See* SEC Brief at 198)

Finally, the SEC makes the intriguing suggestion that where it has succeeded "in obtaining remedies ancillary to the award of an injunction" that "restore private party plaintiffs to their status quo ante, or otherwise make them whole for any injury suffered," an "award of damages to a prevailing plaintiff would be inappropriate." (SEC Brief at 17; *see also* 149 n.359) We agree. This principle requires reversal here. The SEC long ago obtained an injunction requiring BPC to offer rescission to every Piper shareholder who tendered pursuant to BPC's exchange offer. The cause of any injury to CCI is that they failed to rescind. The court of appeals added injunctions effectively barring BPC from controlling Piper's board of directors until 1979, when, legally at least, there will be no bar to an amendment of Piper's bylaws changing the number of directors to nine and giving BPC the 5-4 majority that this $36 million judgment so vastly overvalues. Damages were awarded to CCI in the face of the principle enunciated by the SEC, and they were calculated wholly without regard to the effectiveness of these other remedies in mitigating any damages allegedly suffered by CCI.

CONCLUSION

For the reasons stated in this Reply Brief and in our principal Brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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